THE OKLAHOMA BAR
Journal
Volume 90 — No. 9 — 5/4/2019

Court Issue

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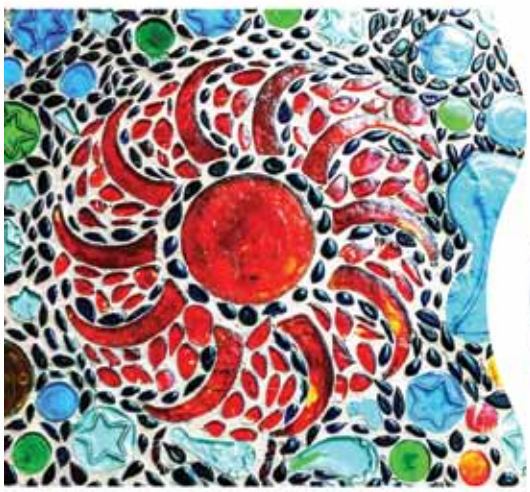

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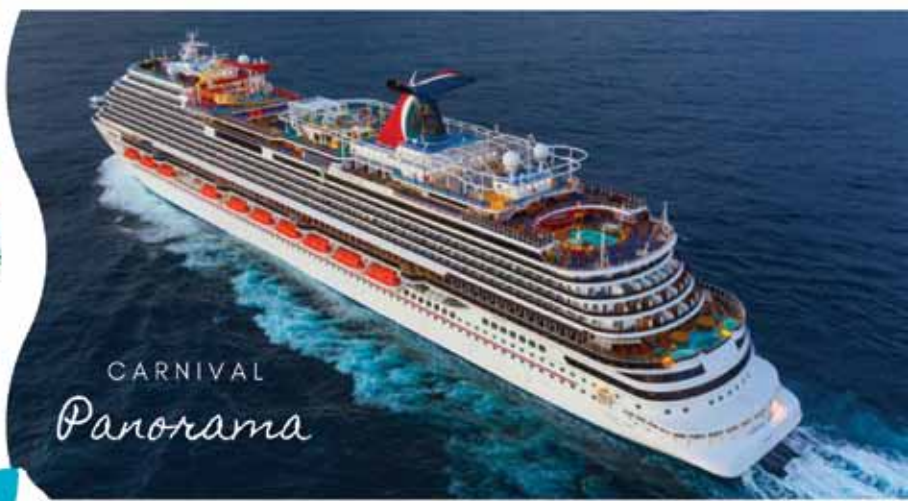

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THE OKLAHOMA BAR
Journal

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Notice of Judicial Vacancy

The Judicial Nominating Commission seeks applicants to fill the following judicial office:

District Judge
Fifteenth Judicial District, Office 1 • Muskogee County

This vacancy is due to the untimely passing of the Honorable Mike Norman on February 25, 2019.

To be appointed to the office of District Judge, Fifteenth Judicial District, Office 1, one must be a legal resident of Muskogee County, at the time (s)he takes the oath of office and assumes the duties of office. Additionally, prior to appointment, such appointee shall have had a minimum of four years experience as a licensed practicing attorney, or as a judge of a court of record, or both, within the State of Oklahoma.

Application forms can be obtained on line at www.oscn.net, click on Programs, then Judicial Nominating Commission or by contacting Tammy Reaves at (405) 556-9300. Applications must be submitted to the Chairman of the Commission at the address below **no later than 5:00 p.m., Friday, May 10, 2019. If applications are mailed, they must be postmarked by midnight, May 10, 2019.**

Mike Mordy, Chairman
Oklahoma Judicial Nominating Commission
Administrative Office of the Courts
2100 N. Lincoln Blvd., Suite 3
Oklahoma City, Oklahoma 73105

Oklahoma Bar Association

table of contents

May 4, 2019 • Vol. 90 • No. 9

page

Index to Opinions of Supreme Court

Index to Opinions of Court of Civil Appeals

2019 OK 18

In re: Amendments to Rule 3 and Rule 4 of the State Board of Examiners of Certified Shorthand Reporters, 20 O.S. 2011, ch. 20, app. 1

No. SCAD-2019-30. Monday, April 8, 2019

ORDER

Rule 3 and Rule 4 of the State Board of Examiners of Certified Shorthand Reporters, 20 O.S. 2011, ch. 20, app. 1, are hereby amended as shown on the attached Exhibit "A." Rules 3 and 4 with the amended language noted are attached as Exhibit "B". The amended rules shall be effective April 12, 2019.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 8TH DAY OF APRIL, 2019.

/s/ Noma D. Gurich
CHIEF JUSTICE

ALL JUSTICES CONCUR.

EXHIBIT A

Rules of the State Board of Examiners of Official Shorthand Reporters
Title 20, Chapter 20, App. 1
Rule 3. Eligibility.

a) Every candidate who seeks to be examined for enrollment as a certified shorthand reporter shall:

1) Prove to the satisfaction of the Board that he/she is:
i) of legal age;
ii) meets the requisite standards of ethical fitness; and
iii) has at least a high school education, or the equivalent thereof.

This information shall be furnished to the Board by a sworn, notarized affidavit;

2) Prove to the satisfaction of the Board that he/she possesses a minimum level of court reporting proficiency which would allow the applicant to meet the examination requirements established in Section 1503(B)(1) of Title 20. An applicant may satisfy such requirements by obtaining verification through a court reporting school official of the applicant's level of proficiency, as outlined by the test application; by passing a preliminary proficiency examination, which has been approved by the Board; or by proving that the applicant has previously held any state or national shorthand reporting certificate or license;

3) Submit to the Secretary of the Board, or a designee, a properly completed application form provided by the Board, accompanied by such evidence, statements or documents as required by the Board, including an examination fee receipt from the Clerk of the Supreme Court showing payment of the fees required by the Board and approved by the Supreme Court;

4) Declare that he/she is a writer of shorthand by one of the accepted methods set forth in Section 1503(D) of Title 20 of the Oklahoma Statutes; and

5) Provide such additional proof as may be required by the Board to establish that the candidate meets the requirements set forth in Section 1503 of Title 20 of the Oklahoma Statutes.

b) Academic dishonesty during the examination process will result in the applicant's disqualification, and the applicant may not take the examination again for two (2) years from the date of the examination at which the applicant was disqualified.

c) A candidate who has previously failed an examination may be re-examined at any subsequent regular examination upon giving the Board notice via the standard application, and payment of the applicable examination fee as set by the Board and approved by the Supreme Court. The examination fee will be forfeited if the candidate fails to appear for the examination, or fails to complete the examination, unless an exception is granted by the Board.

Rules of the State Board of Examiners of Certified Shorthand Reporters
Title 20, Chapter 20, App. 1
Rule 4. Test Requirements.

a) The examination for enrollment as a certified shorthand reporter shall consist of the following:

1) Testimony and Proceedings Skills Examination – A two-voice question-and-answer dictation of testimony at two hundred (200) words per minute for five (5) minutes. Speaker designations such as "Q" and "A" will not be read nor counted as words, but must be appropriately indicated in the transcript. One (1) hour will be given for the transcription of the question-and-answer dictation.

2) Literary Materials Skills Examination – A five-minute dictation of literary material at one hundred eighty (180) words per minute. One (1) hour will be given for the transcription of the literary dictation.

3) The Oklahoma Written Knowledge Test – A written knowledge test of not less than twenty-five (25) multiple choice questions relating to the Oklahoma law and court rules, duties of certified shorthand reporters, and general court procedure. This section of the examination will be administered in forty-five (45) minutes. Applicants will be provided with the study aids from which the test questions will be taken.

b) Candidates may take one or both of the skills examinations at any regularly scheduled examination. A candidate who has successfully completed either of the skills examinations may retain the credit for that portion of the examination for two (2) years from the date passed, and will not be required to retake that portion of the examination during the two (2) year period.

c) Candidates may take the Oklahoma Written Knowledge Test at any regularly scheduled examination. Proof of minimum proficiency shall not be required for candidates taking only the Oklahoma Written Knowledge Test. A candidate who has successfully completed the Oklahoma Written Knowledge portion of the examination may retain the credit for that portion of the examination for two (2) years from the date passed, and will not be required to retake that portion of the examination during the two (2) year period.

d) A candidate who provides proof of passing the Registered Professional Reporter Examination of the National Court Reporters Association, or an equivalent test as authorized by the Supreme Court, is eligible for enrollment without taking the skills examinations described in paragraphs a(1) and a(2) of this Rule. The applicant must, prior to certification, pass the Oklahoma Written Knowledge portion of the examination, and meet all other applicable eligibility requirements.

EXHIBIT B

Rules of the State Board of Examiners of Official Shorthand Reporters
Title 20, Chapter 20, App. 1
Rule 3. Eligibility.

a) Every candidate who seeks to be examined for enrollment as a certified shorthand reporter shall:

1) Prove to the satisfaction of the Board that he/she is:

i) of legal age;

ii) meets the requisite standards of ethical fitness; and

iii) has at least a high school education, or the equivalent thereof.

This information shall be furnished to the Board by a sworn, notarized affidavit;

2) Prove to the satisfaction of the Board that he/she possesses a minimum level of court reporting proficiency which would allow the applicant to meet the examination requirements established in Section 1503(B)(1) of Title 20. An applicant may satisfy such requirements by obtaining verification through a court reporting school official of the applicant's level of proficiency, as outlined by the test application; by passing a preliminary proficiency examination, which has been approved by the Board; or by proving that the applicant has previously held any state or national shorthand reporting certificate or license;

3) Submit to the Secretary of the Board, or a designee, a properly completed application form provided by the Board, accompanied by such evidence, statements or documents as required by the Board, including an examination fee receipt from the Clerk of the Supreme Court showing payment of the fees required by the Board and approved by the Supreme Court;

4) Declare that he/she is a writer of shorthand by one of the accepted methods set forth in Section 1503(D) of Title 20 of the Oklahoma Statutes; and

5) Provide such additional proof as may be required by the Board to establish that the candidate meets the requirements set forth in Section 1503 of Title 20 of the Oklahoma Statutes.

b) Academic dishonesty during the examination process will result in the applicant's dis-

qualification, and the applicant may not take the examination again for two (2) years from the date of the examination at which the applicant was disqualified.

c) A candidate who has previously failed an examination may be re-examined at any subsequent regular examination upon giving the Board notice via the standard application, and payment ~~in full~~ of the applicable examination fee as set by the Board and approved by the Supreme Court. ~~The examination fee must be paid for each examination taken by a candidate, regardless of the candidate's failure to pass a prior examination or any portion thereof.~~ The examination fee will be forfeited if the candidate fails to appear for the examination, or fails to complete the examination, unless an exception is granted by the Board.

Rules of the State Board of Examiners of Certified Shorthand Reporters
Title 20, Chapter 20, App. 1
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3) The Oklahoma Written Knowledge Test – A written knowledge test of not less than twenty-five (25) multiple choice questions relating to the Oklahoma law and court rules, duties of certified shorthand reporters, and general court procedure. This section of the examination will be administered in forty-five (45) minutes. Applicants will be provided with the study aids from which the test questions will be taken.

b) Candidates may take one or both of the skills examinations at any regularly scheduled examination. A candidate who has successfully completed either of the skills examinations may retain the credit for that portion of the examination for two (2) years from the date passed, and will not be required to retake that portion of the examination during the two (2) year period. ~~There will be no reduction in examination fee for any applicant retaining credit for either skills portion of the examination.~~

c) Candidates may take the Oklahoma Written Knowledge Test at any regularly scheduled examination. Proof of minimum proficiency shall not be required for candidates taking only the Oklahoma Written Knowledge Test. A candidate who has successfully completed the Oklahoma Written Knowledge portion of the examination may retain the credit for that portion of the examination for two (2) years from the date passed, and will not be required to retake that portion of the examination during the two (2) year period. ~~There will be no reduction in examination fee for any applicant retaining credit for the written knowledge portion of the examination.~~

d) A candidate who provides proof of passing the Registered Professional Reporter Examination of the National Court Reporters Association, or an equivalent test as authorized by the Supreme Court, is eligible for enrollment without taking the skills examinations described in paragraphs a(1) and a(2) of this Rule. The applicant must, prior to certification, pass the Oklahoma Written Knowledge portion of the examination, and meet all other applicable eligibility requirements.

2019 OK 28

JAMES TODD BEASON and DARA BEASON, Plaintiffs/Appellants/Counter-Appellees, v. I.E. MILLER SERVICES, INC., Defendant/Appellee/Counter-Appellant.

No. 114,301. April 23, 2019

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY

¶0 Plaintiffs brought a personal-injury action, and a jury returned a verdict in their favor. The Honorable Patricia Parrish, District Judge, reduced the amount of the actual noneconomic damages awarded by the jury to comply with the statutory cap on damages contained in 23 O.S. 2011 § 61.2, and then entered judgment on the verdict as modified. Plaintiffs appealed, challenging the statutory cap on damages, as well as other matters. Defendant filed a coun-

ter-appeal, also attacking the judgment on various grounds. A motion to retain the appeal in this Court was granted. We hold that 23 O.S. 2011 § 61.2(B)-(F) is an impermissible special law that violates Article 5, Section 46 of the Oklahoma Constitution because it singles out for different treatment less than the entire class of similarly situated persons who may sue to recover for bodily injury. We further hold that none of the defendant's assignments of error in its counter-appeal is sufficient to reverse the judgment.

JUDGMENT OF THE DISTRICT COURT REVERSED IN PART; CAUSE REMANDED WITH DIRECTIONS TO ENTER JUDGMENT ON THE JURY'S VERDICT

Ed Abel, Lynn B. Mares, Kelly S. Bishop, and T. Luke Abel, Abel Law Firm, Oklahoma City, Oklahoma, and Valerie M. Nannery, *pro hac vice*, and Robert S. Peck, *pro hac vice*, Center for Constitutional Litigation, P.C., Washington, D.C., for James Todd Beason and Dara Beason, Plaintiffs/Appellants/Counter-Appellees.

Robert Todd Goolsby, Perry E. Kaufman, and Megan C. Lee, Goolsby, Proctor, Heefner and Gibbs, P.C., Oklahoma City, Oklahoma, for I. E. Miller Services, Inc., Defendant/Appellee/Cross-Appellant.

Mithun Mansinghani, Solicitor General, and Sarah A. Greenwalt, Assistant Solicitor General, Office of the Oklahoma Attorney General, Oklahoma City, Oklahoma, for the State of Oklahoma.

Amy Sherry Fischer, Foliart Huff Ottaway & Bottom, Oklahoma City, Oklahoma, and Mark Alan Behrens, *pro hac vice*, Shook, Hardy & Bacon L.L.P., Washington, D.C., for *Amici Curiae*, American Tort Reform Association, NFIB Small Business Legal Center, and Coalition for Litigation Justice, Inc.

Rex Travis and Paul Kouri, Travis Law Office, Oklahoma City, Oklahoma, and Simone Gosnell Fulmer, Fulmer Group PLLC, Oklahoma City, Oklahoma, for *Amicus Curiae*, Oklahoma Association for Justice.

Erin A. Renegar and Carline J. Lewis, Wiggins, Sewell & Ogletree, Oklahoma City, Oklahoma, for Amicus Curiae, Oklahoma Association of Defense Counsel.

V. Glenn Coffee and Denise K. Lawson, Glenn Coffee & Associates, PLLC, Oklahoma City, Oklahoma, for *Amici Curiae*, Oklahoma State Chamber of Commerce and Industry, Inc., and Chamber of Commerce of the United States of America.

REIF, J.

¶1 At issue is the constitutionality of a legislative enactment – 23 O.S. 2011 § 61.2 – that statutorily limits a plaintiff's recovery of noneconomic damages to $350,000 unless special findings are made. In this case, the trial court significantly reduced the jury's award based on its application of 23 O.S. 2011 § 61.2(B)-(F). We conclude that the challenged statutory provision – the cap on actual noneconomic damages – is wrought with an irremediable constitutional infirmity: It is a special law categorically prohibited by Article 5, Section 46 of the Oklahoma Constitution. We hold that 23 O.S. 2011 § 61.2(B) – (F) is unconstitutional in its entirety, and we reverse the trial court's judgment to the extent it modified – and reduced – the jury's verdict in favor of the plaintiffs.

I.

¶2 The facts underlying this controversy may be briefly stated. A boom from a crane fell and hit Todd Beason. The crane was operated by an employee of the defendant, I.E. Miller Services, Inc. The employee was attempting to move an 82,000-pound mud pump without the assistance of another crane or vehicle. As a result of his injury, Beason underwent two amputations on parts of his arm.

¶3 Beason and his wife, Dara Beason, brought an action against the defendant. The matter went to trial in Oklahoma County. The jury awarded $14,000,000 to Todd Beason and $1,000,000 to Dara Beason. The jurors then signed a "supplemental verdict form" allocating $5,000,000 of the $14,000,000 awarded to Todd Beason as actual noneconomic damages. The trial judge determined that all of Dara Beason's damages were noneconomic in nature.

¶4 The full text of 23 O.S. 2011 § 61.2 provides:

> A. In any civil action arising from a claimed bodily injury, the amount of compensation which the trier of fact may award a plaintiff for economic loss shall not be subject to any limitation.
>
> B. Except as provided in subsection C of this section, in any civil action arising from a claimed bodily injury, the amount of compensation which a trier of fact may

award a plaintiff for noneconomic loss shall not exceed Three Hundred Fifty Thousand Dollars ($350,000.00), regardless of the number of parties against whom the action is brought or the number of actions brought.

C. Notwithstanding subsection B of this section, there shall be no limit on the amount of noneconomic damages which the trier of fact may award the plaintiff in a civil action arising from a claimed bodily injury resulting from negligence if the judge and jury finds, by clear and convincing evidence, that the defendant's acts or failures to act were:

1. In reckless disregard for the rights of others;

2. Grossly negligent;

3. Fraudulent; or

4. Intentional or with malice.

D. In the trial of a civil action arising from claimed bodily injury, if the verdict is for the plaintiff, the court, in a nonjury trial, shall make findings of fact, and the jury, in a trial by jury, shall return a general verdict accompanied by answers to interrogatories, which shall specify all of the following:

1. The total compensatory damages recoverable by the plaintiff;

2. That portion of the total compensatory damages representing the plaintiff's economic loss;

3. That portion of the total compensatory damages representing the plaintiff's noneconomic loss; and

4. If alleged, whether the conduct of the defendant was or amounted to:

a. reckless disregard for the rights of others,

b. gross negligence,

c. fraud, or

d. intentional or malicious conduct.

E. In any civil action to recover damages arising from claimed bodily injury, after the trier of fact makes the findings required by subsection D of this section, the court shall enter judgment in favor of the plaintiff for economic damages in the amount determined pursuant to paragraph 2 of subsection D of this section, and subject to paragraph 4 of subsection D of this section, the court shall enter a judgment in favor of the plaintiff for noneconomic damages. Except as provided in subsection C of this section, in no event shall a judgment for noneconomic damages exceed the maximum recoverable amounts set forth in subsection B of this section. Subsection B of this section shall be applied in a jury trial only after the trier of fact has made its factual findings and determinations as to the amount of the plaintiff's damages.

F. In any civil action arising from claimed bodily injury which is tried to a jury, the jury shall not be instructed with respect to the limit on noneconomic damages set forth in subsection B of this section, nor shall counsel for any party nor any witness inform the jury or potential jurors of such limitations.

G. This section shall not apply to actions brought under The Governmental Tort Claims Act or actions for wrongful death.

H. As used in this section:

1. "Bodily injury" means actual physical injury to the body of a person and sickness or disease resulting therefrom;

2. "Economic damages" means any type of pecuniary harm including, but not limited to:

a. all wages, salaries or other compensation lost as a result of a bodily injury that is the subject of a civil action,

b. all costs incurred for medical care or treatment, rehabilitation services, or other care, treatment, services, products or accommodations as a result of a bodily injury that is the subject of a civil action, or

c. any other costs incurred as a result of a bodily injury that is the subject of a civil action;

3. "Fraudulent" or "fraud" means "actual fraud" as defined pursuant to Section 58 of Title 15 of the Oklahoma Statutes;

4. "Gross negligence" means the want of slight care and diligence;

5. "Malice" involves hatred, spite or ill will, or the doing of a wrongful act intentionally without just cause or excuse;

6. "Noneconomic damages" means nonpecuniary harm that arises from a bodily injury that is the subject of a civil action, including damages for pain and suffering, loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, education, disfigurement, mental anguish and any other intangible loss; and

7. "Reckless disregard of another's rights" shall have the same meaning as willful and wanton conduct and shall mean that the defendant was either aware, or did not care, that there was a substantial and unnecessary risk that his, her or its conduct would cause serious injury to others. In order for the conduct to be in reckless disregard of another's rights, it must have been unreasonable under the circumstances and there must have been a high probability that the conduct would cause serious harm to another person.

I. This section shall apply to civil actions filed on or after November 1, 2011.

Applying the provisions of 23 O.S. 2011 § 61.2(B) – (F), the district court reduced the verdict to $9,700,000. That is, the jury's total award of $6,000,000 in noneconomic damages to the Beasons was lowered to $700,000 (or $350,000 per person) in accordance with the statute's cap on damages.

¶5 The Beasons filed a motion to conform the judgment to the jury's verdict and the evidence, and reiterated their pretrial argument that 23 O.S. 2011 § 61.2 was unconstitutional. The trial court denied the Beasons' motion, rejecting their constitutional challenge to the statute. The Beasons timely appealed the judgment, arguing that 23 O.S. 2011 § 61.2 is unconstitutional because – in the main – the statute is a special law in violation of Article 5, Section 46 of the Oklahoma Constitution.[1] The defendant also brought a counter-appeal from the judgment, asserting various trial errors. We retained the appeal.

II.

A.

¶6 Article 5, Section 46 of the Oklahoma Constitution provides that the Legislature shall not pass special laws affecting certain subjects. It enacts a "mandatory prohibition against special laws." *Zeier v. Zimmer, Inc.*, 2006 OK 98, ¶ 7, 152 P.3d 861, 865. A statute is a special law when part of an entire class of similarly affected persons is segregated and targeted for different treatment. *Reynolds v. Porter*, 1988 OK 88, ¶ 14, 760 P.2d 816, 822. To be sure, "the Legislature has a wide latitude to create statutory classifications, but they must be reasonable." *Ponca Iron & Metal, Inc. v. Wilkinson*, 2010 OK 75, ¶ 6, 242 P.3d 534, 536; *see also Loyal Order of Moose, Lodge 1785 v. Cavaness*, 1977 OK 70, ¶ 16, 563 P.2d 143, 147 (statutory classifications must "above all be reasonable"). "The Legislature runs afoul of the prohibition on enacting special laws set forth in Oklahoma Const. Art. 5 § 46 when it adopts a classification that is arbitrary and capricious and bears no reasonable relationship to the object of the Legislation." *Ponca Iron & Metal,* 2010 OK 75, ¶ 6, 242 P.3d at 536. Stated another way, Article 5, Section 46 requires uniformity of treatment when like-situated litigants arrive at the courthouse door: "[C]ourt procedure [must] be symmetrical and apply equally across the board for an entire class of similarly situated persons or things." *Zeier,* 2006 OK 98, ¶ 13, 152 P.3d at 868; *see also State ex rel. Macy v. Bd. of Cty. Comm'rs of Cty. of Oklahoma*, 1999 OK 53, ¶ 14, 986 P.2d 1130, 1138; *Tate v. Browning-Ferris, Inc.*, 1992 OK 72, ¶ 18, 833 P.2d 1218, 1229-30.

¶7 Here, the statutory cap on noneconomic damages resulting from bodily injury – contained in 23 O.S. 2011 § 61.2(B)-(F) – is the type of special law that is forbidden by Article 5, Section 46 of the Oklahoma Constitution. It is a special law because it targets for different treatment less than the entire class of similarly situated persons who sue to recover for bodily injury.[2] *Ponca Iron & Metal,* 2010 OK 75, ¶ 6, 242 P.3d at 536; *see also Zeier,* 2006 OK 98, ¶ 13, 152 P.3d at 867 ("In a special laws attack under art. 5, § 46, the only issue to be resolved is whether a statute upon a subject enumerated in the constitutional provision targets for different treatment less than an entire class of similarly situated persons or things."). "The shortcoming of a special law is that it does not embrace all the classes that it should naturally embrace . . . ." *Wall v. Marouk,* 2013 OK 36, ¶ 5, 302 P.3d 775,

779. The failing of the statute is that it purports to limit recovery for pain and suffering in cases where the plaintiff survives the injury-causing event, while persons who die from the injury-causing event face no such limitation. *See* Okla. Const. art. 23, § 7 ("The right of action to recover damages for injuries resulting in death shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation . . . .").

¶8 But these two categories are not just similarly situated: They stand on *identical* footing with respect to recovery. The personal representative of a person who dies from the injury-causing event can maintain an action to the same extent as if the deceased "might have maintained an action, had he or she lived." 12 O.S. 2011 § 1053(A). Such recovery includes "mental pain and anguish" suffered by the decedent. *Id.* § 1053(B). As noted, the people of Oklahoma have expressly forbidden "any statutory limitation" on the amount recoverable for damages for injuries resulting in death. Okla. Const. art. 23, § 7. If a decedent can recover without limitation for pain and suffering during the time between the harm-causing event and his or her death, no good reason exists to treat a person who survives the harm-causing event differently with respect to recovery for the very same detriment.

¶9 The fact that the statutory cap can be lifted, if the injured party can show certain degrees of culpability on the part of the harm-causing agent, does not save the statute from its discriminatory effect. The shared experience of everyday life teaches that a collapsing brick wall can inflict bodily injuries on one person that result in death and bodily injuries on another person that do not result in death, and that the resulting pain and suffering in each case can be substantially the same. Pain and suffering do not vary depending upon the source of the collapse and do not care if the source of the collapse is the result of a tornado, an earthquake, a terrorist act, intentional conduct, negligent design, or strict-liability activity. Culpability or lack of culpability has no bearing whatsoever on the extent of the suffering a victim – deceased or surviving – sustains.

¶10 By forbidding limits on recovery for injuries resulting in death, the people have left it to juries to determine the amount of compensation for pain and suffering in such cases, and no good reason exists for the Legislature to provide a different rule for the same detriment simply because the victim survives the harm-causing event. And the people have demonstrated their intent that the Legislature not discriminate in this way by expressly prohibiting the Legislature from enacting special laws. Okla. Const. art. 5, § 46; *see also Reynolds*, 1988 OK 88, ¶ 21, 760 P.2d at 824 ("Those who participated in the formation of our Constitution expressed in Art. 5, § 46 a strong fear that those with political power would carve out for themselves special exceptions to our general laws."). In addition, the people have commanded that "where a general law can be made applicable, no special law shall be enacted." Okla. Const. art 5, § 59. Again, it should be stressed that the pain and suffering for which a personal representative can recover in a wrongful-death suit is the same detriment for which the decedent would have the right to recover had the decedent lived.

¶11 Unlike the Legislature (which has imposed a discriminatory cap that favors only one party), the people of Oklahoma have shown a clear preference that damages for personal injury be based on an assessment of evidence by a jury in a proceeding where the interested parties have the equal right to be heard on that issue. This process also has the further protection of judicial review that includes new trial, judgment notwithstanding the verdict, additur, remittitur, and – finally – appeal.

¶12 Given the fact that the people have vested the jury with constitutional responsibility to determine the amount of recovery for pain and suffering from an injury resulting in death, this Court must presume a jury would be equally competent to make the same determination in a case where the injury does not result in death. This faith and confidence of the people in the jury system are enshrined within our sacrosanct Bill of Rights, expressed through the command that "[t]he right of trial by jury shall be and remain inviolate." Okla. Const. art. 2, § 19.

¶13 "The manifest intent of our Constitution's framers was that all persons under the same conditions and in the same circumstances be treated alike and that the legislature be prohibited from tampering with limitations by fashioning special acts." *Reynolds,* 1988 OK 88, ¶ 19, 760 P.2d at 823. If the people of Oklahoma ever believe the jury system and judicial review are no longer effective to balance the competing interests over compensation in private personal-

injury cases, then constitutional amendment – not a special law – is the proper way to provide such change. *See* Okla. Const. art. 2, § 1 ("All political power is inherent in the people; and government is instituted for their protection, security, and benefit, and to promote their general welfare; and they have the right to alter or reform the same whenever the public good may require it . . . .").

¶14 It is noteworthy that the only power the people have given the Legislature to enact statutory limits on the amount recoverable in civil actions is found in Article 23, Section 7 of our Constitution, and is addressed to "civil actions or claims against the state or any of its political subdivisions." Cases of this nature – as well as cases to compensate for death resulting from work-related injuries – involve public-policy interests, like sovereign immunity and the "Grand Bargain" of the workers' compensation system, that are not present in a private-rights dispute like the case at hand.

¶15 In holding that 23 O.S. 2011 § 61.2(B)-(F) is unconstitutional, we take care to emphasize that "[t]his Court does not correct the Legislature, nor do we take upon ourselves the responsibility of legislating by judicial fiat." Zeier, 2006 OK 98, ¶ 31, 152 P.3d at 874. We "recognize[] that a statute is the solemn act of the Legislature." *Id.* ¶ 12, 152 P.3d at 866. But we are *required* to apply the Oklahoma Constitution with absolute fidelity. And "a special statute under § 46 is *never* permissible."[3] *Reynolds*, 1988 OK 88, ¶ 17, 760 P.2d at 823. As the "independent department of government charged with the responsibility of protecting the constitution," we have the solemn yet ur-gent duty to act when a "statute is clearly, palpably and plainly inconsistent with the constitution" – as here. *Zeier,* 2006 OK 98, ¶ 12, 152 P.3d at 866-67. We hold that 23 O.S. 2011 § 61.2(B)-(F) violates Article 5, Section 46 of the Oklahoma Constitution.

B.

¶16 As a final matter, we turn to the defendant's counter-appeal from the trial court's judgment. The defendant argues that (1) 12 O.S. § 3009.1 applies to both past and future medical expenses; (2) the testimony of two witnesses failed to satisfy the requirements of 12 O.S. § 702, and also that their testimony was prejudicial; (3) evidence on the issue of warranties covering costs for future repair of prosthetics should have been allowed; (4) the jury should have been informed whether personal-injury awards for personal damages are subject to state and federal taxation; (5) the statutory cap on damages codified in 23 O.S. 2011 § 61.2 should have been applied "per lawsuit rather than per plaintiff"; (6) the trial court committed error when refusing to allow the jury to consider the negligence of nonparties; and (7) the trial court committed further error by allowing the defendant's investigation report for the plaintiffs' use without allowing the defendant to explain the basis for the conclusions in the report or admit the report in its entirety.

¶17 We find the defendant's seven assignments of error lack merit because (1) 12 O.S. § 3009.1 does not apply to future medical expenses not yet incurred; (2) the asserted errors raised on appeal concerning the testimony of the life-care planner and the plaintiffs' economist do not show abuses of discretion by the trial court; (3) the trial court did not abuse its discretion in failing to instruct the jury on tax liability; (4) the trial court correctly ruled evidence of warranties for medical devices was not proper; (5) any alleged error concerning a cap on actual noneconomic damages applied on a "per lawsuit" basis was not preserved for appeal; (6) the defendant was not entitled to a "ghost tortfeasor" instruction, and the trial court's ruling on the same was not error; and (7) the trial court did not commit reversible error by allowing the defendant's employee to testify concerning his conclusions found in the investigation report, although the witness used the statements of others in forming some of his conclusions.

¶18 We conclude that none of the defendant's assignments of error is sufficient to reverse the judgment of the trial court.

III.

¶19 In conclusion, special acts "create preferences and establish inequality." *Reynolds*, 1988 OK 88, ¶ 19, 760 P.2d at 823. Because that is precisely what the Legislature has done here, we hold that 23 O.S. 2011 § 61.2(B)-(F) is a special law absolutely proscribed by Article 5, Section 46 of the Oklahoma Constitution. Accordingly, we reverse that part of the trial court's judgment modifying the jury's award of noneconomic damages to the plaintiffs. We remand this cause to the district court with directions to enter judgment in the full amount of the jury's verdict.

JUDGMENT OF THE DISTRICT COURT REVERSED IN PART; CAUSE REMANDED

WITH DIRECTIONS TO ENTER JUDGMENT ON THE JURY'S VERDICT.

¶20 Darby, V.C.J., Colbert and Reif, JJ., and Goodman, S.J. and Walkley, S.J., concur;

¶21 Gurich, C.J., concurs in part and dissents in part;

¶22 Gurich, C.J., concurring in part and dissenting in part:

I concur in the majority opinion except I conclude that 23 O.S 2011 § 61.2 (B) is constitutional but would sever §61(E) & (F) as unconstitutional.

¶23 Winchester (**by separate writing**), Edmondson (**by separate writing**), JJ., and Fischer, S.J., dissent;

¶24 Kauger, J., recused;

¶25 Combs, J., disqualified.

WINCHESTER, J., dissenting:

¶1 I respectfully dissent. It is important to point out what 23 O.S.2011, § 61.2 does not do: (1) it does not cap damages in cases of wrongful death; (2) it does not cap economic damages for lost wages; (3) it does not cap economic damages for medical expenses; and (4) it does not bar the first $350,000 of non-economic damages, such as pain and suffering. With the passage of § 61.2, the Legislature determined that, due to the subjective nature of a recovery for pain and suffering, such damages should be capped at $350,000 in ALL "civil action[s] arising from a claimed bodily injury." 23 O.S. 2011, § 61.2. Significantly, this cap can be lifted where a plaintiff shows, by clear and convincing evidence, that the defendant acted in reckless disregard for the rights of others, was grossly negligent, acted fraudulently, or acted with intent or malice. 23 O.S.2011, § 61.2(C). In these scenarios, there is no cap.

¶2 The majority finds that there should be no cap for pain and suffering and that the Legislature has created an impermissible, special law. This ruling is contrary to other legislative acts which incorporate caps, such as the Worker's Compensation Act and the Governmental Tort Claims Act. I believe the Legislature acted within its rights in creating this valid cap on non-economic damages.

¶3 The majority further fails to narrowly tailor its ruling and, instead, broadly rules that § 61.2 is invalid in its entirety. I specifically disagree that § 61.2 is an unconstitutional, special law. As this Court has stated on numerous occasions, a special law is one that relates to particular persons or things of a class, in contrast with a general law which applies to ALL persons or things of a class. *See, e.g., City of Enid v. Public Employees Relations Board,* 2006 OK 16, ¶15, 133 P.3d 281 (A general law "relates to persons or things as a class rather than relating to particular persons or things.") citing *Grant v. Goodyear Tire & Rubber Co.*, 2000 OK 41, ¶5, 5 P.3d 594, 597, and *Reynolds v. Porter,* 1988 OK 88, ¶14, 760 P.2d 816, 822. A law can be general and still have a local application or apply to a designated class so long as it operates equally upon all subjects within the class for which it was adopted. *Burks v. Walker,* 1909 OK 317, ¶23, 109 P. 544, 549. Applying this reasoning, § 61.2 is a general law.

¶4 Oklahoma's Constitution doesn't prohibit all local and special laws, only those which concern certain enumerated subjects. *Braitsch v. City of Tulsa,* 2018 OK 100, ¶9, 436 P.3d 14, 20; Okla. Const. art. 5, § 46.[1] The majority claims § 61.2 creates an impermissible class because "it singles out for different treatment less than the entire class of similarly situated persons who may sue to recover for bodily injury." Specifically, the majority finds that "no good reason exists for the Legislature to provide a different rate for the same detriment simply because the victim survives the harm-causing event." The majority manufactures a subclass that is reliant on the plaintiff's survivability despite acknowledging that the Legislature is expressly prohibited from imposing a non-economic damages cap in wrongful death actions. *See* Okla. Const. art 23, § 7 (The right of action to recover damages for injuries resulting in death shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation...."). Because the Legislature is constitutionally forbidden to restrict non-economic damages in wrongful death actions, the "impermissible" class concocted by the majority is a constitutional impossibility and cannot serve as the basis with which to find § 61.2 unconstitutional.[2]

¶5 Moreover, the statute's plain language indicates its general applicability as it applies equally to ALL plaintiffs with a claimed bodily injury. There is no subclass impermissibly distinguishing the types of claims as in *Zeier v. Zimmer*, 2006 OK 98, 152 P.3d 861 (medical malpractice), *Wall v. Marouk,* 2013 OK 36, 302 P.3d 775 (professional negligence); or *Mont-*

gomery v. Potter, 2014 OK 118, 341 P.3d 660 (non-economic damages unrecoverable for injuries caused by uninsured drivers). *But see, Lee v Bueno*, 2016 OK 97, 381 P.3d 736 (statute limiting admissibility of evidence concerning medical costs in personal injury litigation to what had actually been paid or was owed for a party's medical treatment, rather than the amount billed for that treatment, was not an unconstitutional special law). I would find that § 61.2 is a general law and does not violate the constitutional prohibition of special laws under Okla. Const. art. 5, § 46. Accordingly, I dissent.

EDMONDSON, J., DISSENT, and joined by FISCHER, S.J.

I. Introduction

¶1 I cannot join the Court's opinion. The Court holds the statutory cap on damages in 23 O.S. 2011 § 61.2 is an unconstitutional special law. I disagree. The statutory cap on noneconomic damages is not a prohibited special law. A legislative cap on damages when properly enacted as a partial defense or defining the nature of a cause of action, within certain constitutional limits, is included within the historically recognized role of a legislature in defining, creating, or abolishing a legal cause of action. None of plaintiffs' challenges have any merit on the issue whether the Legislature may create a cap on damages.

¶2 Plaintiffs also challenge the Legislature's specific method the cap is enforced or applied in a legal action. One of plaintiffs' challenges has merit. Language in § 61.2 prohibits a jury from being informed of the cap and applying it to the action, and this language infringes on the constitutional function of a jury specified in Okla. Const. Art. 7 § 15. The language in § 61.2 on the method of enforcing the cap apart from a jury is severable from the language creating the cap on damages. Both defendants and plaintiffs are entitled to a properly instructed jury applying the cap on damages and the matter should be remanded for a new trial for the benefit of both sides to this controversy.

¶3 The Court's opinion holds no reason exists to reverse the judgment based upon the seven assignments of error in defendant's counter-appeal. If the matter was remanded for a new trial as I suggest, then to the extent any of defendant's assignments of error, or parts thereof, are imperfectly preserved for appeal they could be renewed in the trial court on remand.[1] Defendant's assignments of error which are properly before us do not raise any reason for reversing the trial court's judgment. The Court has not provided a detailed explanation with authority showing the errors in defendant's arguments in the counter-appeal. I see no reason for burdening my dissent with several pages of explanation and citations to authority when such may, or may not, disagree with the explanation and authority left unexpressed by the Court's opinion adjudicating the counter-appeal.

¶4 In summary, the Oklahoma Legislature's constitutional function includes creating, abolishing, and defining a legal cause of action, and this function includes creating a cap on damages for a cause of action, unless prohibited by a provision of the Oklahoma or U.S. Constitutions. No claim by plaintiffs herein shows any provision of those Constitutions acting to prohibit the Oklahoma Legislature from creating the § 61.2 cap on damages. Secondly, a jury's constitutional function includes being informed of the law and applying the law to the matters before it. A jury has the constitutional function of applying the law, including a legislative cap on damages, and this function is severable from the unconstitutional language in § 61.2 requiring a judge to apply the cap. The matter should be remanded for a new trial with the jury applying the cap on damages in 23 O.S. § 61.2.

II. Art. 5 § 46, the Legislature's Cap on Damages, and the Court's Opinion

¶5 The Court concludes the cap on noneconomic damages is a special law because it "targets for different treatment less than the entire class of similarly situated persons who sue to recover for bodily injury;" and this is so because the statute "purports to limit recovery for pain and suffering in cases where the plaintiff survives the injury-causing event, when persons who die from the injury-causing event face no such limitation." Court's Opinion at ¶ 7. The Court's opinion states "no good reason exists to treat a person who survives the harm-causing event differently with respect to recovery for the very same detriment." *Id.* ¶ at 8. The Court observes: "the only power the people have given the Legislature to enact statutory limits on the amount recoverable in civil actions is found in Article 23, Section 7, and is addressed to 'civil actions or claims against the state or any of its political subdivisions.'" *Id.* at ¶ 14. The Court characterizes this controversy as a "private-rights dispute" not involving "public-policy interests." *Id.*

¶6 The Court's reasoning is flawed in several respects. The reasoning states the Legislature must legislatively treat tort actions the same as a wrongful death action when the tort actions and a wrongful death action have a common element to their causes of action. The Court's analysis finds the source of this limitation in its application of Okla. Const. Art. 5 § 46, Art. 23 § 7, and an *ipse dixit* assessment that "no good reason exists to treat a person who survives the harm-causing event differently with respect to recovery for the very same detriment." Because the Court has a combined analysis of the Legislature's power to define a cause of action, Art. 5 § 46, and rationality for regulating bodily-injury actions, I respond with a combined analysis.

¶7 A constitutional analysis of the power of the Oklahoma Legislature begins with the well-known judicial recognition that the Oklahoma Legislature is constitutionally vested by Article 5 § 36[2] of our Constitution with a supreme legislative power extending to all rightful subjects,[3] and the presumed constitutionality of a legislative enactment is rebutted only when either the State Constitution or federal law prohibits that enactment.[4] This Court does not examine the Constitution to decide whether the Legislature is permitted to act, only whether it is prohibited from acting.[5] The Court explained thirty years ago in *Fair School Finance Council of Oklahoma, Inc. v. State*:[6]

> The United States Constitution is one of restricted authority and delegated powers. By contrast our state constitution is not one of limited powers where the State's authority is restricted to the four corners of the document. Rather, the Oklahoma Constitution addresses not only those areas deemed fundamental but also others which could have been left to statutory enactment. While the Congress of the United States may do only what the federal constitution has granted it the power to do, our state Legislature generally may do, as to proper subjects of legislation, all but that which it is prohibited from doing.

The majority's observation that Art. 23 § 7 is "the only power the people have given the Legislature to enact statutory limits on the amount recoverable" is not relevant since the general legislative power to create a limit on the amount recoverable in a civil action is permitted *unless expressly prohibited by a constitutional provision.*

¶8 Implying that the power of the Legislature to create a limit of possible recovery in civil actions generally because the power was expressly given to the Legislature in Okla. Const. Art. 23 § 7[7] ignores both the history of the 1985 amendment to Art. 23 § 7 and the original purpose of Art. 23 § 7. The 1985 amendment had its origin in a legislative referendum crafting a response to the Court's 1983 opinion in *Vanderpool v. State*,[8] which withdrew judicially-created sovereign immunity as a defense to a tort action in Oklahoma. The Legislature's response removed limits on recovery in actions against the State pursuant to the new Governmental Tort Claims Act (51 O.S.Supp.1985 §§ 151-171), and legislative concern was based upon the fact that this new statutory action would allow some wrongful death claims with notice requirements in the new Act that were not identical with a statute of limitations for a wrongful death action.[9]

¶9 Further, this concept was reinforced three years after the amendment's effective date in 1985 when a party urged that the former Political Subdivision Tort Claims Act (51 O.S.1981 §§ 151 et seq.), was inconsistent with Okla. Const. Art. 23 § 7, which then existed in a form *without the express language authorizing a legislative limitation on a right of recovery in such actions*. Justice Summers' 1988 opinion for the Court explained: (1) Wrongful death actions were unknown at common law and *existed solely by virtue of statutory enactment*; (2) Article 23 § 7 was created to embody into the fundamental law the statutory "right of action" for wrongful death; (3) The Oklahoma statutory authorization for wrongful death prior to, and after adoption of, Art. 23 § 7 did not provide for an action against the sovereign; and (4) The Political Subdivision Tort Claims act barred the plaintiffs' action for wrongful death because the pre-*Vanderpool sovereign immunity was in effect* and acted to trump the statutory right protected by Art. 23 § 7.[10] In summary, Article 23 § 7 applies and protects the wrongful death action *when no immunity is present*. Again, the concern of the Legislature was for creating a uniform procedure for a governmental tort claim *when no immunity is present* without Art. 23 § 7 interfering with that governmental tort claim which existed solely by virtue of statutory enactment.

¶10 The majority fails to recognize the pre-1985 limitation on the Legislature in Art. 23 § 7 to alter a wrongful death statutory action was

eased or lessened in 1985 by allowing the legislature to create a period for notice and filing suit in the governmental tort claims act when immunity would not exist and a person could recover for a wrongful death within the time period specified for governmental tort claims. In other words, if the Legislature allowed a person to pursue a governmental tort claims action for wrongful death under the new 1985 Act, then the amended Art. 23 § 7 would not require governmental tort actions alleging wrongful death to have a limitations period specified in a wrongful death statute.[11] The Court's opinion has improperly taken a constitutional amendment to Art. 23 § 7 designed to guarantee the Legislature would not be hamstrung in providing a procedure for governmental tort wrongful death actions and turned that amendment into a constitutional restriction on the Legislature's general powers when creating, abolishing, and defining a cause of action.

¶11 The Legislature created the § 61.2 cap on actual noneconomic damages in a civil action arising from a claimed bodily injury. Damages are a legal remedy in the form of monetary compensation awarded to a party because that party suffered a legal wrong or injury caused by the defendant.[12] The general rule is that the measure of damages for a tort is such amount as will compensate for all the detriment proximately caused thereby.[13] Historically, this Court has explained an injured party is to be placed as near as may be in the situation which he or she would have occupied had not the wrong been done,[14] and the measure of damages for a tort is such amount as will compensate for all the detriment proximately caused thereby.[15] An injured plaintiff has been entitled to compensation for physical pain and suffering directly resulting from the wrongful acts of the defendant, and future pain and suffering on the part of the injured person in consequence of the injury have constituted a proper element of the damages which may be allowed.[16]

¶12 Damages may be classified as a remedy *for certain purposes* and a person generally possesses no vested right to a remedy or procedure altered by the Legislature.[17] But if the legislation is more than a procedural change to the remedy and affects the substantive right of a party, then a person has a vested right to the remedy existing when the cause of action accrues.[18] Classifying damages as a remedy which may or may not give rise to a substantive right[19] in the context of retroactive application does not address the question presented concerning the cap and a Legislature's power to change a common law action as it relates to a party's right to a jury trial or any other personal constitutional right.

¶13 The Court objects to wrongful death plaintiffs receiving more compensation than other plaintiffs who have suffered a bodily injury. A similar argument by plaintiffs is framed in terms of an Okla. Const. Art. 2 § 19[20] right to a jury trial to receive *complete* compensation from a jury.[21] When Art. 2 § 19 involving the right to a jury trial was adopted courts recognized harms occurred in fact but without a corresponding legal harm, *i.e.*, an injury in fact without a corresponding legal cause of action.[22] The common law prior to adoption of Art. 2 § 19 did not guarantee a right to complete legal compensation for an injury in fact. For example, the common law used the ancient phrase, *damnum absque injuria*,[23] for an injury to the person for which the law furnished no redress, and the concept applied when there existed an injury in fact without a legal duty.[24] A similar result has occurred in those cases where this Court has explained a plaintiff's degree of involvement in the event causing injury, *i.e.*, "the bystander" cases, was insufficient for a basis of liability when a defendant's actions caused plaintiff's emotional distress.[25] In such instances the law recognizes plaintiffs may indeed have an actual injury in fact, but the plaintiffs' injuries are not legally compensable.

¶14 This absence of a right to a complete legal remedy, or right for complete compensation for an injury in fact, is part of the historically understood role for a Legislature establishing and destroying legal rights and duties (liabilities).[26] *Torts do die, they are not eternal, and sometimes the means of their demise are legislative enactments*.[27] When a tort dies from legislative abolishment it is not the role of an appellate court to resurrect it because an individual has suffered an injury. For example, at one time the common law provided "heart balm" or amatory tort actions based upon a third party's interference with a marriage relationship and these actions often evolved into an action authorized by statute.[28] Oklahoma at one time recognized an alienation-of-affections action,[29] and then the Legislature abolished this type of action.[30] There were no doubt people after the effective date of the statute who could not proceed with an amatory tort action although their injury had

been historically recognized at common law prior to Statehood.

¶15 In addition to the Legislature's power to destroy a person's right to recover damages, the Legislature may also limit in part a person's right to recover by providing a partial defense or create a partial recovery where one did not previously exist in the law. In 1986 the Court explained the Legislature could constitutionally remove a common-law defense when a person sought damages in a surface damages action authorized by statute, and the Court noted no one possessed a vested right in a common-law defense.[31] The $350,000 cap is simply the conceptual mirror-image of what the Legislature accomplished and the Court approved in 1986. In our case today, the Legislature is adding a defense (to the extent of damages over the cap) to an action instead of removing a defense in its entirety.[32] The Legislature is given the power pursuant to Okla. Const. Art. 5 § 36 to create, alter, or destroy a cause of action.[33] The Legislature's cap is a statutory effort similar to our comparative negligence statutory scheme where law concerning liability was altered. There was no common law right, or any personal constitutional right, for a party to obtain complete legal compensation in a manner supplanting the Legislature's role in defining a cause of action. Of course, any argument which relies *solely* on the power of a legislative body to create or abolish statutory rights and remedies as proof that a statutory classification is thereby constitutional is fallacious; and is also historically-discredited insufficient legal reasoning in circumstances where a legislative police power has been exercised in an unconstitutional manner.[34] However, *the Court avoids the issue of the Legislature's power to alter a cause of action and the presence of public interests other than its ipse dixit statement a public interest is not present*. The Court avoids the issues whether (1) any public interest reason may constitutionally support limiting damages for torts involving bodily injury, and (2) a legislative expression defining a cause of action in this matter is a constitutional exercise of a police power *based upon the challenges by plaintiffs*. I conclude the plaintiffs have not met their burden to show an unconstitutional exercise of a police power by the Legislature when it defined or amended a cause of action involving bodily injury.[35]

¶16 The Court's opinion states that the matter before us does not involve "public interests" but merely a "private-rights dispute." The Court holds a bodily injury classification is unreasonable for a "private-rights dispute," and a cap on damages based on such is not a proper legislative regulation of tort actions in Oklahoma. One could hardly think of a dispute involving interests more private than those in the heart balm or amatory actions, but this Court as well as others have recognized legislative regulation legitimately exercised when abolishing such tort actions. Of course, the private nature of the rights at issue in heart balm actions is a not sufficient reason for characterizing such actions as private and without any public interests supporting legislative regulation of such torts. Similarly, the Court characterizing today's controversy as a "private-rights dispute" may not be based upon the fact that plaintiffs and defendant are not public entities or that the action is for tort damages arising from the conduct of a party. I now turn to the Court's unsupported characterization of this controversy as a mere private dispute and its failure to recognize and discuss the public interests involved.

¶17 The parties and *amici curiae* make several legal arguments which have at their core very different views on the priorities assigned to the function of tort law in our society as it relates to a cap on damages. One of these differences is a clash between (1) the view that tort law should prioritize and serve a State-recognized interest to create lower insurance costs, and (2) the view that tort law should prioritize and serve a State-recognized interest requiring every person to be fully compensated in a court of law for the actual economic and non-economic damages caused by another person when adjudicated in the context of a private law dispute.[36] Both of these views recognize a public interest in a proper functioning tort system, but they of course disagree on the nature of that system and the role a cap on damages should or should not have in such a system. This clash of views occurs in many types of controversies where damages have been capped. For example, a cap on the amount an injured party may recover is frequently found in no-fault compensation statutory schemes where a State interest is present and both the injured party and the party causing the injury receive statutory benefits when participating in the compensation program.[37] One author has opined that in such a circumstance the individual rights perspective in tort yielded "to a collective, insurance-based model of compensation."[38] Some

authors argue caps on damages will bring less volatility to the insurance premium market.[39] Other authors argue that while adoption of a noneconomic damages cap reduces the number of torts filed and the number of medical malpractice filings in different states, when the noneconomic damages cap was eliminated the rate of medical malpractice filings did not rebound to its previous rate but was further depressed.[40] One author recently noted that "twenty-one states have already adopted caps on noneconomic damages, while twenty-two have caps on total compensation."[41]

¶18 As the Attorney General, certain *amici curiae*, and the defendant indicate, the Court is not presented with a controversy where the Legislature has allocated both benefits and detriments as in a no-fault compensation program, but an instance where a legislative determination has been made that our society, as a collective, benefits from not fully compensating injured plaintiffs for their actual injuries. For example, the Attorney General's brief argues that capping actual noneconomic damages in negligence actions is reasonable because a cap furthers the public's access to certain types of medical care by lowering medical malpractice insurance premiums and reducing the desire of physicians to "order unnecessary tests and referrals" as practicing medicine defensively to avoid litigation. In summary, his argument is that society needs doctors and the cost for this need is made by shifting the loss for certain damages to the injured individuals without fully compensating them for their injuries. He argues lower insurance premiums and their effect on business costs should outweigh and receive greater importance and legal value than compensating an individual for his or her actual injuries.

¶19 The defendant, Attorney General, and *amici curiae* argue their positions are supported by courts in many other states which have rejected state constitutional challenges to statutory caps on noneconomic damages in tort actions, and these include but are not limited to Alaska,[42] Idaho,[43] Kansas,[44] Nebraska,[45] Ohio,[46] Utah[47] and Virginia.[48]

¶20 Wisconsin and Indiana have approached the issues with statutory plans combining both limitation of liability with additional compensation for an injured party. Wisconsin's court has rejected constitutional challenge when state statutes provide a $750,000 cap, made health care providers not personally liable for medical malpractice when they have satisfied statutorily required insurance coverage, and a fund was created to compensate those injured for damages in excess of the mandatory liability coverage.[49] An Indiana court determined a limitation on a plaintiff's recovery did not violate equal protection, the right to jury trial, and other constitutional claims.[50] However, this court's decision occurred in the context of a statutory scheme providing (1) a liability limit for medical providers and requiring their insurance coverage for a stated amount, (2) compensation to an injured party from a compensation fund for damages in excess of the medical malpractice liability limit, and (3) gradually increasing over time the potential statutory amount an injured party could receive from the compensation fund.[51] The statutory schemes of Wisconsin and Indiana requiring mandatory insurance coverage, provider limits on liability, and compensation in excess of that liability appear to fit within a category of court review suggested by an article in the American Law Reports explaining statutes which limit an injured party's recovery for damages "may be evaluated in terms of the reasonability of a complete statutory scheme affecting many aspects of medical malpractice litigation," including an analysis of the statutory *quid pro quo* benefits given to an injured party whose damages have been capped.[52] Such statutory schemes appear to have the goal of lowering insurance costs while simultaneously providing a mechanism to compensate injured parties. However, courts have generally not analyzed capped damages and the differences between (1) a *quid pro quo* requirement involving a claim based upon a common law right/liability as opposed to claim based upon a constitutional right/liability, or (2) differences due to applying a *quid pro quo* analysis to the particular right alleged to have been violated.[53]

¶21 Courts in other states have concluded that caps on damages are unconstitutional, and these include, but are not limited to, Florida,[54] Illinois,[55] South Dakota,[56] and Washington.[57] The Supreme Court of Missouri has held a statutory cap on punitive damages and a restriction on post-judgment interest are constitutional, but a cap on noneconomic damages violates a party's right to a jury trial.[58] A Texas court determined a $500,000 cap on noneconomic damages violated open courts provision of state constitution, and the court's decision was followed by a constitutional amendment authorizing legislative caps on noneconomic

damages.[59] One author has recently noted that some state courts have held a statutory cap on damages curtails a civil jury trial right and exceeds legislative authority, as well as noting these decisions are "in the minority."[60] State courts have continued to disagree whether caps on damages violate provisions of state constitutions. In the absence of Oklahoma formally adopting law from another state which has the same constitutional provisions,[61] court decisions from other states which are well-reasoned have no more authority than persuasive effect if they are consistent with Oklahoma's jurisprudence, and when inconsistent they have no legal effect in our courts.[62] This Court must examine the plaintiffs' and defendant's arguments based upon the law in this State.

¶22 The plaintiffs, defendant, and *amici curiae* in this controversy do not expressly identify the exact logic or *ratio decidendi* the Court must use to define and adjudicate personal rights and public interests in this controversy. However, their arguments invoke different elements of at least four different decision-making methods each of which has a different place for judicial recognition of a public interest in its method.[63] The Court concludes, without explanation, there is no public interest involved and of course finds no need to engage in any judicial decision-making requiring a balancing between private and public interests as suggested by some of the arguments herein. Interestingly, when the Court states there is no public interest involved in this dispute it is championing an extreme view that not even plaintiffs adopt. Some arguments by plaintiffs and supporting *amicus curiae* do recognize a general public interest involved in the controversy, but challenge defendant's assessment of the importance of that interest for a balancing or a hierarchy of values assessment by the Court. Further, the Court's failure to recognize the several public interests and public policy raised in this controversy ignores the basic or fundamental nature of a public interest present when an Oklahoma cause of action is defined or redefined by either the Legislature or this Court for judicial enforcement in Oklahoma courts.[64]

¶23 The Court's opinion objects to the Legislature using "bodily injury" as a classification for torts and the types of legal damages. Of course, insurance policies are frequently issued to cover damage to property and damage to person or "bodily injury," and our Legislature and this Court have recognized the "public interests" in legislative regulation of insurance concerning bodily injury in a variety of circumstances, including automotive polices and polices obtained by schools.[65] As the discussion herein indicates, the cap on noneconomic damages in actions involving "bodily injury" is explained by defendant and supporting *amici curiae* as a method for regulating insurance, specifically insurance for damage to person.

¶24 The Court's opinion states "no good reason exists to treat a person who survives the harm-causing event differently with respect to recovery for the very same detriment"[66] and it compares the wrongful death action with other tort actions for bodily injury. Of course, a quick answer is that the Legislature may like to create a cap on all tort actions involving bodily injury, but is prohibited from doing so by Art. 23 § 7. In one sense, the Legislature is not the reason for the distinction between the two actions, but Art. 23 § 7 itself. The People, in enacting Art. 23 § 7 have said "wrongful death actions are different from all other actions and we the People are enshrining this difference in the fundamental law (Art. 23 § 7) so the Legislature may not take it away from us, or regulate it, like other causes of action."

¶25 An example of one flaw in the Court's reasoning may be demonstrated from an opinion Justice Summers authored for the Court thirty years ago, *St. Paul Fire & Marine Ins. Co. v. Getty Oil*,[67] one of our cases discussing statutes of repose. *St. Paul Fire & Marine Ins. Co.* highlights the difference between legislative alteration of an element to a cause of action, *i.e.*, legislation affecting the right itself versus legislature not altering a substantive right. This difference was used in *St. Paul Fire & Marine Ins. Co.* to distinguish *Reynolds v. Porter*,[68] which the Court uses for its analysis today. In summary, when the Legislature alters an element to the cause of action, by creating a partial defense such as a cap of damages, *Reynolds v. Porter* does not apply, and the Court's Art. 5 § 46 analysis today conflates two distinguishable types of legislative acts for an Art. 5 § 46 analysis.

¶26 A statute of repose acts as a limitation on the right and not the remedy, and by acting on the right itself acts to create a time-related element to a cause of action.[69] This added element to the cause of action is entirely a creature of the Legislature.[70] A statute of repose does not violate Okla. Const. Art. 5 § 46, and the Court stated the following.

> By actually defining a substantive right, the statute of repose clearly distinguishes itself from the statute at issue in *Reynolds,* in which the statute of limitations failed by identifying and treating differently one subclass of tort claimants from another.
>
> No such inequity obtains by operation of the statute of repose here at issue. Section 109 [the statute of repose] itself defines the class.

St. Paul Fire & Marine Ins. Co., 1989 OK 139, 782 P.2d at 921, distinguishing *Reynolds v. Porter, supra.*

Oklahoma Constitution, Article 5 § 46, prohibits *constitutionally-specified* local or special laws for certain purposes.[71] In *Reynolds* the constitutionally-prohibited purpose was a limitation in a civil action, but *St. Paul Fire & Marine Ins. Co*. involved the Legislature defining the contours of, or elements to, a civil action; *i.e.*, *St. Paul Fire & Marine Ins. Co.* involved a civil action subject to a statute of repose legislatively amending or altering the cause of action. The legislative act defining the cause of action did not violate Okla. Const. Art. 5 § 46 because a statute defining a cause of action or substantive right "falls outside the enumerated prohibitions in Art. 5, § 46 of the Oklahoma Constitution, and its validity cannot be successfully attacked thereunder."[72]

¶27 Language in the challenged statute *must* involve "one of the subjects listed in section 46."[73] The Court's opinion fails to expressly state the exact language in Art. 5 § 46 that prohibits 23 O.S. § 61.2. The Court does refer to the Art. 5 § 46 requirement for uniform procedure, but this has no application to § 61.2 which creates a statutory substantive right[74] to be enforced via an affirmative defense. The Tenth Circuit Court of Appeals has recently explained (1) a state statutory cap on damages is state "substantive law,"[75] (2) federal courts must apply substantive law in diversity cases,[76] and (3) upon reviewing both 23 O.S. § 61.2 and Oklahoma Supreme Court decisions concluded the damages cap in 23 O.S. § 61.2 is an affirmative defense and a personal substantive right of a defendant.[77] Section 61.2 does not unconstitutionally regulate the practice or jurisdiction of, or change the rules of evidence in judicial proceedings. The statute creates a substantive right enforced as other substantive rights in tort actions where defenses are recognized.

¶28 In summary, I simply cannot join in the Court's analysis of 23 O.S. § 61.2 and Okla. Const. Art. 5 § 46.

III. Analysis of Okla. Const. Art. 5 § 46

¶29 When this Court determines the constitutional validity of a legislative enactment: (1) This Court must give effect to the intent of the Constitution's framers and the people adopting it without regard to our own view of a provision's propriety, wisdom, desirability, necessity, or practicality as a working proposition; (2) This Court's search for the framers' and electorate's intent is to be conducted by examining the text of the instrument itself and when the text is not ambiguous, the Court may not look for a meaning outside its bounds; (3) The Court may presume the Legislature conducts its business with due regard for the framers' and people's intent; (4) A duly-enacted statute will be presumed to conform to the state and federal Constitutions and will be upheld unless it is clearly, palpably and plainly inconsistent with the Constitution; and (5) The party challenging a statute's constitutionality possesses a heavy burden to establish the statute is in excess of legislative power.[78]

¶30 Plaintiffs argue 23 O.S. 2011 § 61.2 is a constitutionally prohibited special law violating Okla. Const. Art. 5 § 46. I have explained herein Art. 5 § 46 does not contain a limitation on the Legislature's power to define one of the elements to a tort cause of action, *i.e.*, the damages element.[79] Article 5 § 46 simply does not apply herein. I apply this principle to the specific arguments by plaintiffs' and address their claim of improper classification.

¶31 Again, this provision prohibits the Legislature from creating a special law in certain categories of law. Article 5 § 46 states in part:

> The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law authorizing: . . .
>
> Regulating the practice or jurisdiction of, or changing the rules of evidence in judicial proceedings or inquiry before the courts, justices of the peace, sheriffs, commissioners, arbitrators, or other tribunals, or providing or changing the methods for the collection of debts, or the enforcement of judgments or prescribing the effect of judicial sales of real estate; ….

Plaintiffs argue 23 O.S. 2011 § 61.2 is a constitutionally prohibited special law because it applies to a subset of tort plaintiffs and not all tort plaintiffs. Plaintiffs identify the subset as (1) personal injury plaintiffs, (2) not killed by defendant's acts or omissions, and (3) who are awarded more than $350,000 in noneconomic damages. Plaintiffs' Art. 5 § 46 challenge also states section 61.2 is an unconstitutional special law because the statute creates exceptions to the cap when a defendant's acts or failures to act were in reckless disregard for the rights of others, grossly negligent, fraudulent, or intentional or with malice. Plaintiffs also argue § 61.2 is an unconstitutional special law by imposing a "clear and convincing" evidentiary standard as opposed to a "preponderance of the evidence" standard for plaintiff to show gross negligence, fraud, or intentional or reckless conduct. Plaintiffs argue § 61.2 is a non-uniform law concerning the rules of evidence, because it requires both the judge and the jury to determine an issue of fact and law concerning when the acts of the defendant relating to removal of the $350,000 cap because of the language "if the judge and jury finds" in 61.2 (C). Plaintiffs state this participation of the judge in an issue of fact is a procedure interfering with the jury's function.

¶32 The terms of Okla. Const. Art. 5 § 46 command that the *practice and jurisdiction of court proceedings and the rules of evidence* be symmetrical and apply equally across the board for an entire class of similarly situated persons or things.[80] In *Lee v. Bueno* the Oklahoma Supreme Court stated that when legislation is challenged under Art. 5 § 46, the only issue to be resolved is whether a statute upon a subject enumerated in the constitutional provision targets for different treatment less than an entire class of similarly situated persons or things.[81] In *Lee v. Bueno*, the Court addressed whether 12 O.S. 2011 § 3009.1 was a special law prohibited by Okla. Const. Art. 5 § 46. The Court explained § 3009.1 l*imited certain types of evidence* admissible by parties in the trial of any civil case involving personal injury.[82] Plaintiff argued therein the general class of plaintiffs with a bodily injury was subdivided by § 3009.1 into classes receiving different treatment based upon insurance status and decisions made by medical providers. The Court rejected the argument and explained the statute "applies uniformly to all personal injury claimants . . . [and] it does not specifically target a particular subclass."[83] Defendants argue that § 61.2 applies to all cases involving bodily injury similar to § 3009.1 applying to all plaintiffs alleging bodily injury.

¶33 Plaintiffs argue § 61.2 facially states application to all cases arising from bodily injury, but the statute also facially creates subclasses within the class of bodily injury cases. In support they assert the cap on noneconomic damages does "not apply to actions for wrongful death, or in civil actions arising from bodily injury where the damages are low." They also assert the cap on damages does not apply in classes where plaintiffs prove by clear and convincing evidence that the defendant's acts or failures to act were in reckless disregard for the rights of others, grossly negligent, fraudulent, or intentional or with malice.

¶34 In *Montgomery v. Potter*,[84] the Court addressed the scope of 47 O.S.2011 § 7-116, and concluded it violated Okla. Const. Art. 5 § 46. The Court first noted § 61.2 provided a "general class" provided by section 61.2: "A general class has been identified in 23 O.S.2011 § 61.2 which allows for all plaintiffs with bodily injury the ability to recover pain and suffering." The Court then noted 47 O.S. § 7-116 targeted specific individuals, uninsured drivers, within the general statutory class of plaintiffs with bodily injuries (23 O.S. § 61.2), and subjected the uninsured drivers to "special treatment in the form of limited remedies, regardless of whether the plaintiff was at fault in causing the accident or not."[85] In *Montgomery* the Court did not address whether section 61.2 was a general or special law, but only characterized it as general in the sense that 47 O.S. § 7-116 carved out a class of bodily injury plaintiffs from potential plaintiffs under 23 O.S. § 61.2.

¶35 Section 61.2 treats defendants differently for damages *based upon their culpability or fault* in causing the specific injuries which are before the jury to adjudicate. By treating the defendants differently it may be said the class of potential plaintiffs will potentially receive different damages based the jury's determination of a particular defendant's culpability. This determination of damages based upon degree of culpability is similar to a jury determining comparative negligence issues. Treating defendants differently based upon their culpability with a potential for increased damages is in accordance with the public policy of Oklahoma as I explain herein.

¶36 The other class distinction raised by plaintiffs is that plaintiffs with low-damages receive complete compensation, but the high-damages plaintiffs receive less than complete compensation. This argument is *similar* to *Montgomery* where § 47-716 prohibited plaintiffs, as uninsured drivers, from recovering damages for pain and suffering, but "all plaintiffs" had a right to recover for pain and suffering under 23 O.S. § 61.2 (as that statute defined that right).[86] Plaintiffs' claim is addressed not to the clear – and-convincing standard in § 61.2, but to the creation of two classes based solely upon a statutory damages cap.

¶37 The scope of plaintiffs' claim is extensive. The underlying rationale in plaintiffs' argument is that the Legislature's power to create a cause of action or defense pursuant to Article 5 § 36 is limited by Art. 5 § 46's prohibition on a special law regulating the practice of the courts *because* the § 46 restriction includes a statutory uniform cap on damages creating two classes of plaintiffs. *Plaintiffs' claim is broad enough to challenge any legislatively-created damage cap unless specifically approved in the Constitution, i.e., Okla. Const. Art. 23 § 7 provision for wrongful death governmental tort actions and enacted for a uniform procedure*. The Oklahoma Supreme Court has rejected equal protection and special law challenges to a statutory liability scheme which included statutory caps when the Court determined the liability scheme was rationally related to a state interest within the power of the Legislature to address.[87] The cap applies to all personal injury plaintiffs but has a varying result based upon a jury's determination.

¶38 I would hold the cap on noneconomic damages with a clear-and-convincing standard in 23 O.S.2011 § 61.2 do not violate Okla. Const. Art 5 § 46 provided those provisions are deemed severable from an unconstitutional portion which I now explain.

IV. Okla. Const. Art. 7§ 15 Challenge to 23 O.S.2011 § 61.2.

¶39 Plaintiffs argue one effect of 23 O.S. 2011 § 61.2 violates Okla. Const. Art. 7 § 15. This statute states as follows.

> A. In any civil action arising from a claimed bodily injury, the amount of compensation which the trier of fact may award a plaintiff for economic loss shall not be subject to any limitation.
>
> B. Except as provided in subsection C of this section, in any civil action arising from a claimed bodily injury, the amount of compensation which a trier of fact may award a plaintiff for noneconomic loss shall not exceed Three Hundred Fifty Thousand Dollars ($350,000.00), regardless of the number of parties against whom the action is brought or the number of actions brought.
>
> C. Notwithstanding subsection B of this section, there shall be no limit on the amount of noneconomic damages which the trier of fact may award the plaintiff in a civil action arising from a claimed bodily injury resulting from negligence if the judge and jury finds, by clear and convincing evidence, that the defendant's acts or failures to act were:
>
> 1. In reckless disregard for the rights of others;
>
> 2. Grossly negligent;
>
> 3. Fraudulent; or
>
> 4. Intentional or with malice.
>
> D. In the trial of a civil action arising from claimed bodily injury, if the verdict is for the plaintiff, the court, in a nonjury trial, shall make findings of fact, and the jury, in a trial by jury, shall return a general verdict accompanied by answers to interrogatories, which shall specify all of the following:
>
> 1. The total compensatory damages recoverable by the plaintiff;
>
> 2. That portion of the total compensatory damages representing the plaintiff's economic loss;
>
> 3. That portion of the total compensatory damages representing the plaintiff's noneconomic loss; and
>
> 4. If alleged, whether the conduct of the defendant was or amounted to:
>
> a. reckless disregard for the rights of others,
>
> b. gross negligence,
>
> c. fraud, or
>
> d. intentional or malicious conduct.
>
> E. In any civil action to recover damages arising from claimed bodily injury, after

the trier of fact makes the findings required by subsection D of this section, the court shall enter judgment in favor of the plaintiff for economic damages in the amount determined pursuant to paragraph 2 of subsection D of this section, and subject to paragraph 4 of subsection D of this section, the court shall enter a judgment in favor of the plaintiff for noneconomic damages. Except as provided in subsection C of this section, in no event shall a judgment for noneconomic damages exceed the maximum recoverable amounts set forth in subsection B of this section. Subsection B of this section shall be applied in a jury trial only after the trier of fact has made its factual findings and determinations as to the amount of the plaintiff's damages.

F. In any civil action arising from claimed bodily injury which is tried to a jury, the jury shall not be instructed with respect to the limit on noneconomic damages set forth in subsection B of this section, nor shall counsel for any party nor any witness inform the jury or potential jurors of such limitations.

G. This section shall not apply to actions brought under The Governmental Tort Claims Act or actions for wrongful death.

H. As used in this section:

1. "Bodily injury" means actual physical injury to the body of a person and sickness or disease resulting therefrom;

2. "Economic damages" means any type of pecuniary harm including, but not limited to:

a. all wages, salaries or other compensation lost as a result of a bodily injury that is the subject of a civil action,

b. all costs incurred for medical care or treatment, rehabilitation services, or other care, treatment, services, products or accommodations as a result of a bodily injury that is the subject of a civil action, or

c. any other costs incurred as a result of a bodily injury that is the subject of a civil action;

3. "Fraudulent" or "fraud" means "actual fraud" as defined pursuant to Section 58 of Title 15 of the Oklahoma Statutes;

4. "Gross negligence" means the want of slight care and diligence;

5. "Malice" involves hatred, spite or ill will, or the doing of a wrongful act intentionally without just cause or excuse;

6. "Noneconomic damages" means nonpecuniary harm that arises from a bodily injury that is the subject of a civil action, including damages for pain and suffering, loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, education, disfigurement, mental anguish and any other intangible loss; and

7. "Reckless disregard of another's rights" shall have the same meaning as willful and wanton conduct and shall mean that the defendant was either aware, or did not care, that there was a substantial and unnecessary risk that his, her or its conduct would cause serious injury to others. In order for the conduct to be in reckless disregard of another's rights, it must have been unreasonable under the circumstances and there must have been a high probability that the conduct would cause serious harm to another person.

I. This section shall apply to civil actions filed on or after November 1, 2011.

In a civil action arising from a claimed bodily injury, this statute limits actual noneconomic compensatory damages to $350,000. This limit does not apply if the defendant acted in reckless disregard for the rights of others. The statute provides a series of procedures a court is instructed to follow in a civil action arising from a claimed bodily injury, such as requiring a jury to answer special interrogatories specifying the portion of actual noneconomic loss awarded by the jury with an express prohibition on informing the jury that actual noneconomic loss will be capped by the judge.

¶40 Plaintiffs argue the effect of 23 O.S. § 61.2 requires a jury to make special findings of particular questions of fact in violation of Okla. Const. Art. 7 § 15. Plaintiffs argue that § 61.2 requires a jury to find facts relating to damages without a jury instruction on the law of actual noneconomic damages, and the actual award of damages being made by the trial judge instead of the jury. Defendant argues damages

are awarded by the jury but capped as a matter of law at the $350,000 amount, and the prohibition on instructing the jury on the cap does not change the "general verdict" required by the statute.

¶41 Section 61.2 states there is a cap of $350,000 for actual noneconomic loss in an action based upon alleged bodily injury regardless of the number of defendants. (61.2 [B]). The cap may be lifted if "the judge and jury finds," by clear and convincing evidence, the defendant's acts, or failures to act, were in reckless disregard for the rights of others; grossly negligent; fraudulent; or intentional or with malice. (61.2 [C]). This finding must be in special interrogatories the jury must answer and return with their verdict. (61.2 [D 4]).

¶42 The jury shall not be instructed with respect to the $350,000 cap. (61.2 [F]). The jury or any potential jurors shall not be informed of the cap by any counsel for any party or any witness.(61.2 [F]). The jury must return a general verdict with answers to special interrogatories. The answers must specify: The total compensatory damages recoverable by the plaintiff; That portion of the total compensatory damages representing the plaintiff's economic loss; and That portion of the total compensatory damages representing the plaintiff's actual noneconomic loss. (61.2 [D 1-3]). After the jury returns its verdict and answers to the interrogatories, the trial judge enters a judgment on the verdict and applies the $350,000 cap on noneconomic damages to the jury's verdict if the answers to interrogatories indicated an award above the cap. (61.2 [E]). I must examine the nature of this statutory cap to determine whether its application in a cause of action is *constitutionally required to be within the constitutionally-specified* role for a jury.

¶43 Section 61.2(B) states in part "the amount of compensation which a trier of fact may award a plaintiff for noneconomic loss *shall* not exceed Three Hundred Fifty Thousand Dollars ($350,000.00) . . . ." Whether this language is mandatory and potentially affecting the exercise of power by a court[88] or discretionary depends upon the language of the statute.[89] This statutory language allows for the jury to exercise its discretion in certain cases and lift the cap.[90] This Court construes a statute to be consistent with constitutional provisions, and I conclude the cap is acting as a liability limit on plaintiffs' right to recover damages as a partial affirmative defense, and is not a limit on the power of the District Court in a common law action.[91]

¶44 The Court has noted when comparative negligence is a statutory creation and an affirmative defense. For example, when explaining a choice-of-law issue in 2003 the Court stated the affirmative defense of comparative negligence could not be separated from the tort for which it was a defense.[92] Comparative negligence is a statutory scheme directing a jury to apportion fault and the amount of damages.[93] The cap on damages in this case acts as a similar, although merely partial, limitation on liability and damages.

¶45 Article 7, § 15 of the Oklahoma Constitution states as follows.

> In all jury trials the jury shall return a general verdict, and no law in force nor any law hereafter enacted, shall require the court to direct the jury to make findings of particular questions of fact, but the court may, in its discretion, direct such special findings.

The statutory definitions for a general verdict and a special verdict have remained unchanged since codified in our statutes in 1910.

> The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant. A special verdict is that by which the jury finds facts only. It must present the facts as established by the evidence, and not the evidence to prove them; and they must be so presented as that nothing remains to the court but to draw from them conclusions of law.

12 O.S.2011 § 587.

Generally, a verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant, but a special verdict is that by which the jury finds facts only and the judge enters a judgment based on those facts.[94]

¶46 In 1977 the Court explained Art. 7 § 15 is not merely a requirement for a particular *form* for a verdict,[95] but a requirement of *substance* for a jury's verdict. In the context of a comparative negligence statute, a party argued a jury should not be told of the legal liability for the cause of action it was actually adjudicating,

and the Court explained Okla. Const. Art. 7 §15 prohibited such procedure.

> It has been said 'the special verdict is the very cornerstone of the comparative negligence concept, and the jury does not, and should not, know the legal effect and result of its answers to the interrogatories in the special verdict.' The jury under a special verdict is limited to the findings of specified facts and should not know the legal effect of its answers. Defendant is correct that in those states using a special verdict the court may create error by informing the jury of the effect of its answers. However, in Oklahoma, because our verdict must be general, this rule of law has no application. The jury not only must know the legal effect of its findings, but must determine the ultimate result, limited only by the special findings as to each parties degree of negligence. Such special findings are constitutionally and statutorily permitted. Under a general verdict, a jury must know the effect of its answers or it is not a general verdict.

Smith v. Gizzi, 1977 OK 91, 564 P.2d 1009, 1013 (notes omitted).

In *Smith* the Court explained a jury determining damages must know by the court's instructions the law applicable to the issue being adjudicated by the jury.

¶47 Jury instructions are explanation of the law of a case enabling a jury to better understand its duty and to arrive at a correct conclusion.[96] The instructions must accurately reflect the law and apply to the issues.[97] The instructions apply to the issues when they are designed to state the law concerning the evidence presented and address what the jury is required by that evidence to adjudicate.[98] The constitutionally-specified role for a jury is to determine damages in a common-law action,[99] which includes consideration of affirmative defenses relating to the measure of damages.

¶48 Plaintiffs cite several of our opinions stating a jury determines the amount of damages recoverable in a personal injury controversy. I certainly agree the jury's role as the trier of fact is to determine the amount of damages to be awarded to an injured party.[100] In 1906 the Supreme Court for the Oklahoma Territory quoted the U.S. Supreme Court and explained an adjudication of damages must depend very much on the good sense and sound judgment of the jury upon all the facts and circumstances of the particular case.[101] A jury must determine the dollar amount of damages, but a jury's discretion is guided or constrained by the law applicable to the controversy. A jury's award which is contrary to the law is grounds for a new trial, and this principle has been codified in our law since 1910 and before.[102]

¶49 In *Grisham v. City of Oklahoma City*, the Court recently explained the following.[103]

> A trial court has a duty to instruct on the decisive issues raised by the pleadings and the evidence. This rule is consistent with the function of jury instructions as well as the concept of fairness to both sides of the controversy. A plaintiff has a right to have his or her theories of recovery presented to the jury; the defendant has a similar right with regard to defenses. Both plaintiffs and the City have a right not only to present evidence relating to the personal injury/nuisance claims but also advocate for proper instructions on such evidence to be considered by a jury. New trials are granted when a trial court fails to instruct on critical legal theories in a case resulting in reversible error when a jury is misled.

Both the plaintiffs and defendant herein have rights pursuant to both Okla. Const. Art. 2 § 19 and Okla. Const. Art. 7 § 15 to present evidence in support of their claims and defenses (such as the cap), and to have a jury instructed on those claims and defenses, and then have that jury return a general verdict.

¶50 *Based upon the arguments presented by the plaintiffs,* I conclude a $350,000 cap on noneconomic damages does not violate plaintiffs' right to a jury trial as guaranteed by Okla. Const. Art. 2 § 19 when the cap is construed and applied as a partial affirmative defense *considered by a jury*.

¶51 I conclude 23 O.S.2011 § 61.2 requiring a jury to make findings of fact on actual noneconomic economic damages without considering and applying an affirmative defense cap as to those damages has the effect of a special verdict which is prohibited by Okla. Const. Art. 7 § 15, and impermissibly removes the jury as the entity applying the law, through proper instructions, to a jury's determination of damages.

V. Okla. Const. Art. 2 §§ 6 & 7 Challenges

¶52 Plaintiffs argue Okla. Const. Art. 2 §§ 6 & 7 are violated by 23 O.S. 2011 § 61.2. These constitutional provisions state as follows.

> The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice.

Okla. Const. Art. 2 § 6:

> No person shall be deprived of life, liberty, or property, without due process of law.

Okla. Const. Art. 2 § 7:

Plaintiffs argue their access to courts (Art. 2 § 6) is violated because their access is "unequal" and is unconstitutionally burdened with a "clear and convincing" evidence standard required by the statute. Plaintiffs' argument based on due process (Art. 2 § 7) appears in footnote number 36 of their brief in chief. They invoke the equal protection component of state constitutional due process and argue those who suffer injuries in excess of the cap are treated unequally by receiving only a portion of their rightful compensation.

¶53 In *John v. Saint Francis Hospital, Inc.*, the Court stated Art. 2, § 6 has three constitutional guarantees (1) access to the courts; (2) right-to-a-remedy for every wrong and every injury to person, property, or reputation; and (3) prohibition on the sale, denial, delay or prejudice of justice.[104] While the right-to-a-remedy component acts on the judiciary and not the Legislature,[105] the access-to-courts component acts on the legislature as well as the judiciary.[106] Plaintiffs state their access to courts is denied by the statute's requirement for a plaintiff to satisfy a "clear and convincing" evidence standard to lift the cap on noneconomic damages.

¶54 This Court has noted three common standards or quanta of proof: (1) preponderance of the evidence, (2) clear and convincing evidence, and (3) beyond a reasonable doubt.[107] The Court explained a preponderance-of-the-evidence standard is generally used in private disputes where the parties equally share the risk of error.[108] The clear-and-convincing standard is employed in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant, where the interest at stake in those cases is deemed to be more substantial than mere loss of money, and some jurisdictions reduce the risk to the defendant of having his or her reputation tarnished erroneously by increasing the plaintiff's burden of proof.[109] Clear and convincing evidence is that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegation sought to be established.[110]

¶55 Plaintiffs state the evidentiary standard "adds to the cost of obtaining a noneconomic damages award greater than the $350,000 cap, even though the additional compensation due is sufficiently proven, and thereby chills the filing of meritorious personal injury suits seeking such damages." Plaintiffs state the amount and quality of evidence necessary to sustain a result based upon a preponderance of evidence is less than that required to met a clear and convincing standard.[111] Plaintiffs cite a lower federal court case and some legal articles on the effect of a heightened pleading burden and its chilling effect on filing lawsuits,[112] and tie this concept to *Zeier v. Zimmer, Inc.*, where the Court held a plaintiff's right to file an action in District Court could not be thwarted by a statute requiring plaintiff to obtain a pre-petition medical opinion and affidavit and thus making court access depend upon a plaintiff's financial status.[113] Plaintiffs' argument using this analogy creates an if-then propositional argument: if a heightened pleading requirement in other types of cases have had an impermissible burden on a plaintiff commencing an action with its subsequent successful conclusion, then a clear and convincing evidentiary standard which creates a burden on a successful conclusion for a plaintiff in the present case should be considered similarly impermissible. In summary, they argue the cap on noneconomic damages with the clear-and-convincing standard in section 61.2 impose a barrier to court access more expensive and burdensome than the unconstitutional affidavit of merit for initiating an action in a district court.

¶56 Plaintiffs also cite an author who concluded concerning Oklahoma's legislative tort reform: "By reducing plaintiffs' potential recoveries, and by enacting barriers to the filing and prosecution of tort claims, tort reforms make many potential cases uneconomical for plaintiffs' attorneys who normally operate on a contingency fee basis."[114] I assume, for the sole

purpose of addressing the argument, the veracity of this statement concerning potential cases being "uneconomical for plaintiffs' attorneys" to commence.[115] This observation by the author is on the topic of legislative tort reform in Oklahoma in a general sense, and not on the specific operation of the clear-and convincing standard and whether that standard necessarily creates an unconstitutional burden on access to courts. Plaintiffs argue the clear-and-convincing standard carves out an impermissible subclass denying equality to plaintiffs who have noneconomic damages in excess of the statutory cap and are thereby not fully compensated for their injury.

¶57 The access-to-courts constitutional guarantee is intended to guarantee that the judiciary would be open and available for the resolution of disputes, but not to guarantee that any particular set of events would result in court-awarded relief.[116] The constitutional provision is not a guarantee to remove all burdens on either a party's ultimate successful recovery or ultimate successful defense. Again, assuming plaintiffs are correct that fewer tort actions are filed as a result of the cap on economic damages, then plaintiffs' challenge is asking this Court to (1) constitutionalize the view that tort law is for the purpose of compensating the individual and (2) make unconstitutional the long-recognized power of the Legislature to define a tort cause of action or adjust defenses in such actions.[117]

¶58 I would hold the cap on economic damages does not violate the access-to-courts component in Okla. Const. Art. 2 § 6.

¶59 Plaintiffs also make *combined* Art. 2 §§ 6 & 7 challenge to the clear-and-convincing standard and the cap on non-economic damages. The Due Process Section of the Oklahoma Constitution includes an equal protection element.[118] When an equal protection challenge is made because a statute creates different classes of people with different legal rights, a legal analysis will often discuss whether the statute's classification is underinclusive (statute includes too few people in its created class) or if the classification is overinclusive (too many people are included in the statutory class).[119] A mere overinclusiveness or underinclusiveness in statutory classification will not necessarily show a failure to satisfy constitutionality.[120] One well-known principle is that a legislature's authority to create or abolish a right or benefit does not mean that the legislature has the authority to create an unconstitutional condition related to that right or benefit. Our Article 2 § 7 analysis of class-creating legislation usually requires an adjudication whether a legitimate State interest exists and whether it is rationally related to the legislation.[121]

¶60 The clear-and-convincing standard has been used in Oklahoma for many types of proceedings including, but not limited to, adoption without consent or termination of a parental right,[122] an Indian Child Welfare Act noncompliant placement,[123] attorney's fee for self-representation,[124] punitive damages in a tort action,[125] conspiracy,[126] common-law marriage,[127] defamation,[128] fraud,[129] injunction,[130] termination of a temporary guardianship,[131] reformation of a contract or deed,[132] and professional discipline for a lawyer.[133] The use of the clear-and-convincing standard does not by itself show an unconstitutional circumstance, but the clear-and-convincing standard may be impermissible for a particular circumstance.[134] Of course, plaintiffs' argument is tied, in part, to the practice of a contingency fee basis in a negligence action where the evidentiary standard is used as opposed to the clear-and convincing standard without a contingency fee in many of these other types of cases.

¶61 The clear-and-convincing standard in 23 O.S.2011 § 61.2 is not tied merely to a cap on noneconomic damages, but also to a particular type of finding by a jury determining an increased level of culpability. The clear-and convincing evidence standard in 61.2 is used by a jury when determining if a defendant's acts or failures to act were (1) in reckless disregard for the rights of others, (2) grossly negligent, (3) fraudulent, or (4) intentional or with malice. Both the Legislature and this Court have recognized that public policy in Oklahoma requires distinguishing ordinary negligence as one category of wrongs from other categories including gross negligence and intentional conduct. For example the Legislature has tied specific types of wrongful conduct to awarding punitive damages,[135] and this Court has explained the public policy for distinguishing ordinary negligence from gross negligence and intentional conduct in the context of a contractual waiver of liability.[136] In *Johnson v. Board of Governors of Registered Dentists of State of Okla.*, the Court observed the U.S. Supreme Court had stated a clear-and-convincing standard had been used in cases involving a jury's determination involving public opprobrium.[137]

¶62 Plaintiffs' challenge to the $350,000 cap in this context is predicated upon: (1) A claim plaintiffs possess a fundamental right to complete economic recovery in the face of contrary legislation defining a cause of action or defense contrary to that right; and (2) A claim no state interest exists in limiting lawsuits, or in the alternative if such an interest exists it cannot outweigh claimant's fundamental right in a complete recovery. Courts have expressly rejected the claim that the common law provided a complete legal remedy for every type of harm in the face of contrary statutes. This principle negates many of plaintiffs' claims. Approximately thirty years ago the Court explained an Art. 2 § 6 access-to-courts claim protects or attaches to a substantive right which has vested, and in the absence of the substantive or fundamental right strict scrutiny is not applied and a rational basis review is used to determine whether the challenged statute is rationally related to a legitimate government interest.[138]

¶63 Plaintiffs appear to agree the number of lawsuits is fewer due to 23 O.S.2011 § 61.2, and this is one of the state interests championed by defendant. Using a clear-and-convincing standard for a different type of culpability and treating a cap on noneconomic damages as a partial defense does not violate public policy; but is in agreement with that policy. Section 61.2 is supported by rationally-related state interests when no arbitrariness in the classification or deprivation of a fundamental right by operation of the statute has been implicated by plaintiffs.[139]

¶64 I would hold the cap on noneconomic damages and the clear-and-convincing standard in 23 O.S.2011 § 61.2 do not violate Okla. Const. Art. 2 § 6 or § 7.

VI. Okla. Const. Art. 4 § 1 Challenge

¶65 Plaintiffs argue section 61.2 violates Okla. Const. Art. 4 § 1, which states as follows.

> The powers of the government of the State of Oklahoma shall be divided into three separate departments: The Legislative, Executive, and Judicial; and except as provided in this Constitution, the Legislative, Executive, and Judicial departments of government shall be separate and distinct, and neither shall exercise the powers properly belonging to either of the others.

Plaintiffs argue (1) "judicial power" is the power to adjudicate a cause of action, (2) damages are an adjudicative fact, (3) § 61.2 "purports to legislate a conclusive, irrefutable presumption that noneconomic damages a plaintiff has suffered can never exceed the legislatively predetermined amount of $350,000, regardless of the jury's determination, and (4) § 61.2 "cripples the free-exercise of decision-making powers reserved to the judiciary." Plaintiffs argue the statute usurps the inherent power of the judiciary to regulate excessive awards by a remittitur, and the statute is imposing a legislative remittitur. Plaintiffs also argue a reduction of damages without consent or a new jury trial cannot be countenanced where the right to a jury is present.

¶66 The power to adjudicate is the power to determine questions of fact or law framed by a controversy and this power is exclusively a judicial power.[140] I have construed the $350,000 cap on noneconomic damages as a partial affirmative defense within the power of the Legislature to create when defining an element to a tort cause of action, and not a legislative finding of fact on damages actually sustained by plaintiffs. I state herein the cap on noneconomic damages and whether it should be lifted must be a decision of a properly instructed jury. Section 61.2 does not violate Okla. Const. Art. 4 § 1 when this construction of the statute is considered.

¶67 I would hold 12 O.S. 2011 § 61.2 does not violate Okla. Const. Art. 4 § 1 due to my construction of § 61.2 herein.

VII. Severability

¶68 I have determined the § 61.2 procedure is unconstitutional when it keeps knowledge of law from a jury relating to an issue the jury is charged with deciding as part of its constitutionally specified role. Is this procedure severable from the statutory cap on actual noneconomic damages? Yes, of course it is. Plaintiffs argue the unconstitutional provisions of § 61.2 are not severable from the other parts of the statute and the Court should hold the entire statute unconstitutional. The argument unconstitutional provisions are severable and the constitutional portions should survive judicial review and be enforced is correct.

¶69 The Legislature requires a severability analysis although its enactment does not expressly include a severability provision.[141] Plaintiffs invoke a supposed anti-jury bias by

the Legislature and invite us to speculate whether a legislature would create a cap if the jury was the entity responsible for implementing a cap on damages, and upon such combined supposition and speculation this Court should conclude the Legislature would not create a cap. Analysis of this nature is not the legal test for severability. This Court is invited to examine the law in other states to see if juries implement a cap in those jurisdictions, and again this is not the well-accepted legal test for severability.

¶70 The Court *is required* to ask if the $350,000 cap on actual noneconomic damages *is capable of enforcement apart from the unconstitutional procedure of keeping applicable law from the eyes of the jury*. The severability question is whether the cap on damages is capable of enforcement by properly instructed juries.[142] Answering this question requires the Court to give consideration to whether the cap relies on the severed unconstitutional portion *of the statute for its necessarily required meaning or enforcement*.[143] Does the statutory cap get its necessarily required meaning or enforcement by an unconstitutional procedure? No, it does not, because a cap on damages is capable of being enforced by a properly instructed jury independently from the unconstitutional procedure of removing the determination of damages from the jury.

¶71 In Oklahoma, past practice was that a jury could be informed of, and apply, a cap on damages. Historically, a few items were required to be in a judicial record for a final adjudication. Examples include plaintiff applying to the correct court, plaintiff's name stated on the face of the record, defendant's name also stated, a description of the wrong complained of, and the amount of damages alleged by plaintiff.[144] As to this last element, in Oklahoma our statutes at one time required a petition in a negligence action alleging personal injuries to plead an amount of damages.[145] The amount of pled damages acted as a cap on damages as a matter of law, and it was not error to instruct a jury on that cap. For example, in 1929 the Oklahoma Supreme Court explained the trial court did not err when giving an instruction limiting the amount the jury could award for personal injury damages to $2,999.00 when that was the amount of damages claimed by the plaintiff.[146] Our opinion agreed with what the Court stated in a Court Syllabus fifteen years earlier, reversible error does not occur when a jury is instructed the damages awarded shall not exceed the aggregate sum sued for, *i.e.*, damages may not be awarded in excess of a cap.[147] Of course, our practice also followed the common law which allowed an *ad damnum* to be amended before trial and a verdict in excess of the *ad damnum* to be corrected by remittitur.[148]

¶72 Abundant authority exists for noting no error necessarily occurs when informing a jury that a cap exists on damages the jury may award. In 1958 the U. S. Court of Appeals for the Ninth Circuit explained two U.S. Supreme Court opinions and one from the Ninth Circuit holding it was not error for a court to state to a jury the specific amount of damages requested by a plaintiff "provided other instructions were given instructing the jury that the amount mentioned was merely *a limit beyond which they could not go*."[149] In 1974 the U. S. Court of Appeals for the Tenth Circuit also noted this principle stating "the federal cases addressing this issue have held that it is not improper for the trial judge to advise the jury that the damages awarded may not exceed the specified amount in the prayer, provided it is made clear that the sum is not suggestive of a proper award, but is a limit beyond which the jury cannot go."[150]

¶73 The cap on damages in the matter before the Court is based upon an amount in a statute versus an amount in a pleading, *but both the historically-recognized pleading-cap and the modern statutory-cap were, and are, impressed upon, or control, the jury's discretion by operation of law*. There is no legally substantive difference to distinguish one type of cap on damages from the other for the purpose of a jury's enforcement. There is no reason to place the historically-recognized cap within a jury's ability to comprehend and properly enforce and remove the modern statutory cap outside the scope of a jury's ability to comprehend and enforce according to a proper jury instruction.

¶74 There are those who appear to have a low view of the abilities of people who serve on juries. They claim a jury informed of a cap on damages will not follow the law, and that a jury will impermissibly attempt to offset a cap with an increase on damages of a different type.[151] The ideological tension between informing a jury of the cap and requiring its nondisclosure to a jury is observed in an opinion from the State of Maine and a Justice from that State commenting on jury instructions. In 1993 a Maine court stated a trial court did not err

when informing the jury (1) the then statutory maximum award or cap for loss of comfort and society under the state's wrongful death statute was $50,000, and (2) the jury could not shift damages in excess of the cap from one category of damages to another.[152] But a mere twelve years later in 2005 a jury instruction manual for that state written by an individual Justice of the Maine Supreme Judicial Court includes no instruction on damage caps and opines "the better choice appears to be that juries should not be told about caps . . . [because] [d]isclosure of caps or multipliers risks diverting the jury's attention from issues they must decide to specific numbers, calculations or compromise findings generated by discussion of the caps or multipliers."[153]

¶75 Oklahoma law has long-recognized that while the determination of the amount of damages is a question for the jury,[154] the amount actually determined by the jury must be within the limits of the evidence presented,[155] and if a jury's determination of damages is unsupported by the evidence, then a new trial may be ordered by a trial judge.[156] In summary, for decades Oklahoma juries could be informed that Oklahoma law limited or capped damages, and if a jury did not follow the law concerning a cap on damages a new trial or remittitur could be ordered by a trial judge. The people of Oklahoma who serve on juries are more than capable of determining damages in specific amounts. They are more than capable of deciding the matters before them based upon the evidence presented to them and the jury instructions they receive. The judges of our District Courts are perfectly capable of assessing whether a jury's verdict exceeds the evidence and the law.

¶76 Plaintiffs argue the cap on damages is not severable because it, "standing alone, would be incomplete and incapable of being executed in accordance with legislative intent." This argument pays no legal traction due to the history of juries routinely applying caps on damages. Discussion is made challenging the statutory language of nondisclosure as part of an anti-jury bias that makes the legislation nonseverable. The improper *ad hominem* nature of this claim is sufficient to show it should not be used for the Court's severability analysis. Actions, in right circumstances, can be a basis for attributing goals or motives to an agent, but here an allegation of bias improperly replaces a capable-of-enforcement argument with a bias argument in an attempt to show nonseverability.[157] The Oklahoma Supreme Court presumes public officials perform their public duties in good faith and this presumption includes the Oklahoma Legislature.[158]

¶77 The good faith of the legislative officials has been attacked by a suggestion that the legislation at issue is a form of duplicitous social economic class protectionism for the purpose of conferring an economic benefit on certain defendants at the expense of certain plaintiffs; and as such the Legislature failed to follow the concept of a free market economy as explained in the writings of certain economists and political philosophers. This suggestion is *wholly* inappropriate in this forum. The Oklahoma Supreme Court has recently explained a statute regulating economic affairs is not unconstitutional merely because an economic detriment or benefit is created by a statutory classification: "The very nature of such statutes is to alter economic benefits with or without corresponding economic detriments."[159] The Court does not *Lochnerize* its analysis by making subjective moral or political preferences rather than using values authoritatively codified in the Constitution.[160] Whether the Legislature faithfully followed the writings of Milton Friedman, Russell Kirk, or any other economist/philosopher does not raise a legal issue pertinent to whether the Legislature followed a value *codified in the Constitution*.

¶78 In summary, an Oklahoma jury is capable of enforcing Oklahoma's § 61.2 cap on actual noneconomic damages apart and separate from the unconstitutional procedure of § 61.2 requiring nondisclosure of the cap to the jury. *Indeed, a properly invoked cap is required to be enforced by the jury upon proper jury instructions*. The constitutionally specified role of an Oklahoma jury is beyond the Legislature's power to alter.

¶79 However, the Legislature does have the Okla. Const. Article 5 power to define and alter common-law actions when the exercise of that power does not otherwise violate some other provision of the Oklahoma or Federal Constitutions. This dichotomy between the absence of legislative power to alter the constitutional function of a jury and the presence of legislative power to alter an Oklahoma cause of action demonstrates why separation of the language in § 61.2 for enforcement by a jury is not only possible, but required.

VIII. Conclusion

¶80 I have concluded plaintiffs' challenges to 23 O.S. § 61.2 have not met their burden except in one instance, the constitutional function of the jury. None of plaintiffs arguments show the § 61.2 cap on damages is unconstitutional. I have concluded the unconstitutional language is severable from the cap on actual noneconomic damages. I would reverse the judgment and remand for a new trial with a properly instructed jury.

REIF, J.

1. The Beasons raise several other constitutional challenges on appeal. Having determined that 23 O.S. 2011 § 61.2(B)-(F) is unconstitutional as a special law prohibited by Article 5, Section 46 of the Oklahoma Constitution, we find that addressing their additional constitutional arguments is unnecessary for the disposition of this appeal.

2. Although the precepts of equal protection may echo in Oklahoma's constitutional injunction against enactment of special laws, the doctrines exist independently of each other. Article 5, Section 46 "is not just a mirror of equal protection notions but rather an absolute and unequivocal prohibition against applying statutory limitations to less than an entire class of like-situated litigants." *Reynolds v. Porter,* 1988 OK 88, ¶ 21, 760 P.2d 816, 824.

3. Our state constitution is a "unique document." *Wall v. Marouk*, 2013 OK 36, ¶ 4, 302 P.3d 775, 779. "Some of its provisions" – including Article 5, Section 46 – "are unlike those in the constitutions of any other state, and some are more detailed and restrictive than those of other states." *Id.* We also note – and not for the first time – that Oklahoma's "prohibition against special laws is not new." *Id.* ¶ 7, 302 P.3d at 779. "Even before statehood and the adoption of the Oklahoma Constitution, special laws were not permissible." *Id.* (citing *Guthrie Daily Leader v. Cameron,* 1895 OK 71, 41 P. 635); *see also Chickasha Cotton Oil Co. v. Lamb & Tyner,* 1911 OK 68, ¶ 0, 114 P. 333, 333 (early post-statehood decision interpreting Article 5, Section 46 as prohibiting "the enactment of special or local laws"). The people's distaste for the discrimination and favoritism of special laws was given lasting force through the 1907 Constitution and retains its vitality today.

WINCHESTER, J., dissenting:

1. Okla. Const. art 5, § 46 provides, in pertinent part:

> The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law authorizing:
>
> Regulating the practice or jurisdiction of, or changing the rules of evidence in judicial proceedings or inquiry before the courts, justices of the peace, sheriffs, commissioners, arbitrators, or other tribunals, or providing or changing the methods for the collection of debts, or the enforcement of judgments or prescribing the effect of judicial sales of real estate.

The Legislature has the power to define what constitutes an actionable wrong, including, within constitutional limits, the ability to abolish or modify common law. S*t. Paul Fire & Marine Ins. Co. v. Getty Oil Co.*, 1989 OK 139, ¶14, 782 P.2d 915, 918-919; Okla. Const. art. 5, § 36. We have recognized this ability is necessary "to reflect a change of time and circumstance." *St. Paul Fire & Marine Ins. Co. v. Getty Oil Co.*, 1989 OK 139, ¶14, 782 P.2d 915, 918-919. Section 61.2's cap on non-economic damages creates an affirmative defense, which is a statutory, substantive right. Because § 46 does not contain a limitation on the Legislature's power to define an element of a tort, such as the damages element, I don't believe this constitutional section is applicable herein to challenge the validity of § 61.2.

2. No doubt § 61.2, as written, would apply to wrongful death actions if not for the existence of Okla. Const. art. 23, § 7.

EDMONDSON, J., DISSENT, and joined by FISCHER, S.J.

1. *Parker v. Elam,* 1992 OK 32, 829 P.2d 677, 682 (a judgment, reversed and remanded, stands as if no trial has been held on remand from a reversed judgment; and the parties are entitled to introduce additional evidence, supplement the pleadings, expand issues, unless expressly or specifically limited by the appellate proceedings in error).

2. Okla. Const. Art. 5 § 36: "The authority of the Legislature shall extend to all rightful subjects of legislation, and any specific grant of authority in this Constitution, upon any subject whatsoever, shall not work a restriction, limitation, or exclusion of such authority upon the same or any other subject or subjects whatsoever."

3. *Movants to Quash Multicounty Grand Jury Subpoena v. Dixon,* 2008 OK 36, ¶ 22, 184 P.3d 546, 553 ("The authority of the Legislature extends to all rightful subjects of legislation not withdrawn by the Constitution or in conflict therewith."); *In re Flynn's Estat*e, 1951 OK 310, 237 P.2d 903, 905 ("The authority of the Legislature extends to all rightful subjects of legislation not withdrawn by the Constitution or in conflict therewith.").

4. *Torres v. Seaboard Foods, LLC*, 2016 OK 20, ¶ 17, n. 14, 373 P.3d 1057, 1066.

5. *In re Detachment of Municipal Territory from City of Ada, Okla.*, 2015 OK 18, ¶ 7, 352 P.3d 1196, 1199.

6. *Fair School Finance Council, Inc. v. State,* 1987 OK 114, 746 P.2d 1135, 1149.

7. Okla. Const. Art. 23 § 7: "The right of action to recover damages for injuries resulting in death shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation, provided however, that the Legislature may provide an amount of compensation under the Workers' Compensation Law for death resulting from injuries suffered in employment covered by such law, in which case the compensation so provided shall be exclusive, and the Legislature may enact statutory limits on the amount recoverable in civil actions or claims against the state or any of its political subdivisions."

8. 1983 OK 82, 672 P.2d 1153.

9. This issue relating to statutory notice for an individual's viable statutory claim (*i.e.*, no sovereign immunity in effect for particular claim) coexisting with a longer limitations period for a statutory wrongful death action was noted by the Oklahoma Bar Association in 1985. *The New Oklahoma Governmental Tort Claims Act Handbook,* 30 (Oklahoma Bar Association, 1985) (explaining 85 O.S.Supp.1985 § 156 (F) and noting Article 23, Section 7 as amended by legislative referendum on April 30, 1985, authorizes the legislature to limit recoveries in wrongful death actions against the state and its political subdivisions).

Compare 51 O.S.Supp.1985 § 156(F) stating in part: "When the claim is one for death by wrongful act or omission, notice may be presented by the personal representative within one (1) year after the alleged injury or loss resulting in such death" with 12 O.S. 1981 § 1053 (A) stating in part: "When the death of one is caused by the wrongful act or omission of another . . . The action must be commenced within two (2) years."

Hammons v. Muskogee Medical Center Authority, 1985 OK 22, 697 P.2d 539, 542 (if no governmental or political subdivision statutory immunity expressly protects the defendant from liability, then Art. 23 § 7 protects the plaintiff's right to proceed to recover for injuries resulting in death).

10. *Wilson v. Gipson*, 1988 OK 35, 753 P.2d 1349, 1354 -1355.

11. *Brookshire v. Burkhart*, 1929 OK 428, 283 P. 571, 577 (time specified in a wrongful death statute for such an action is a limitations period and not a limitation on the right).

12. *Estrada v. Port City Properties, Inc.*, 2011 OK 30, ¶ 35, 258 P.3d 495, 508.

13. *Denco Bus Lines v. Hargis,* 1951 OK 11, 229 P.2d 560, 562.

23 O.S.2011 § 61: "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this chapter, is the amount which will compensate for all detriment proximately caused thereby, whether it could have been anticipated or not."

14. *Deep Rock Oil Corp. v. Griffeth*, 1951 OK 11, 58 P.2d 323, 325, citing *Van Sickle v. Franklin,* 1917 OK 100, 162 P. 950, and *Sackett v. Rose,* 1916 OK 2, 154 P. 1177, L.R.A.1916D, 820.

15. *Deep Rock Oil Corp. v. Griffeth*, 1951 OK 11, 58 P.2d 323, 325-326, citing *Missouri, K. & T. Ry. Co. v. West*, 1913 OK 510, 134 P. 655, *appeal dismissed* 232 U.S. 682, 34 S.Ct. 471, 58 L.Ed. 795 (1914).

16. *Denco Bus Lines v. Hargis,* 1951 OK 11, 229 P.2d 560, 562.

17. *Gibby v. Hobby Lobby Stores, Inc.*, 2017 OK 78, ¶ 9, 404 P.3d 44 (generally, a person possesses no vested right to a remedy or procedure); *Trinity Broadcasting Co. v. Leeco Oil Co.*, 1984 OK 80, 692 P.2d 1364, 1367 (a statute of limitations is procedural and no right vests in the statute until the cause of action is barred by the statute); *Oklahoma Water Resources Bd. v. Central Okla. Master Conservancy Dist.*, 1968 OK 73, 464 P.2d 748, 756 (no one has a vested right in any particular mode of procedure for the enforcement or defense of his rights).

18. *Loftis v. Multiple Injury Trust Fund*, 2003 OK CIV APP 30, ¶ 11, 67 P.3d 924, 926 (Approved for Publication by Supreme Court) (a person has a vested right to a remedy when the cause of action accrues),

quoting *Rivas v. Parkland Manor*, 2000 OK 68, 12 P.3d 452, 458 (recognized as superseded by statute on other grounds); *Evans & Associates Utility Services v. Espinosa*, 2011 OK 81, 264 P.3d 1190; *Loyal Order of Moose, Lodge 1785 v. Cavaness*, 1977 OK 70, 563 P.2d 143, 146 (a right to a remedy will not vest until a cause of action vests or accrues); *Anagnost v. Tomecek*, 2017 OK 7, ¶ 15, 390 P.3d 707 (a vested right to a particular remedy will not vest when the legislation is a procedural change that affects the remedy only, and not the right), quoting *Forest Oil Corp. v. Corp. Comm'n of Oklahoma*, 1990 OK 58, ¶ 11, 807 P.2d 774. *Cf. Winfree v. Northern Pacific Ry. Co.*, 227 U.S. 296, 33 S.Ct. 273, 57 L.Ed. 518 (1913) (a new remedy could not be used when it created a liability and changed a defense not present when the cause of action accrued); *American Dredging Co. v. Miller,* 510 U.S. 443, 454, 114 S.Ct. 981, 127 L.Ed.2d 285 (1994) (contrasting affirmative defenses, such as contributory negligence, which eliminate liability and involve a substantive right versus *forum non conveniens* which does not bear upon the substantive right to recover) (per Scalia, J., for the Court, Part II-B).

19. *See* my conclusion herein that section 61.2 acts to limit the scope of damages and is an alteration to *one element to a tort cause of action* specified in section 61.2. Changing the damages available for a cause of action acts on the cause of action itself and is not a remedial statute. *See also Anagnost v. Tomecek*, 2017 OK 7, n. 26, 390 P.3d 707, 712 citing *Thomas v. Cumberland Operating Company*, 1977 OK 164, ¶ 10, 569 P.2d 974 ("under the great weight of authority, the measure and elements of damages are matters pertaining to the substance of the right and not to the remedy").

20. Okla. Const. Art. 2 § 19:

> The right of trial by jury shall be and remain inviolate, except in civil cases wherein the amount in controversy does not exceed One Thousand Five Hundred Dollars ($1,500.00), or in criminal cases wherein punishment for the offense charged is by fine only, not exceeding One Thousand Five Hundred Dollars ($1,500.00). Provided, however, that the Legislature may provide for jury trial in cases involving lesser amounts. Juries for the trial of civil cases, involving more than Ten Thousand Dollars ($10,000.00), and felony criminal cases shall consist of twelve (12) persons. All other juries shall consist of six (6) persons. However, in all cases the parties may agree on a lesser number of jurors than provided herein.
>
> In all criminal cases where imprisonment for more than six (6) months is authorized the entire number of jurors must concur to render a verdict. In all other cases three-fourths (¾) of the whole number of jurors concurring shall have power to render a verdict. When a verdict is rendered by less than the whole number of jurors, the verdict shall be signed by each juror concurring therein.

21. This Art. 2 § 19 argument by plaintiffs does not make a claim that $350,000 is a constitutionally insufficient and arbitrary amount. *See* the discussion herein relating to Okla. Const. Art. 2 §§ 6,7.

22. *See, e.g.*, Francis M. Burdick, *The Law of Torts*, 486 (Banks & Co., Albany, N.Y., 1906) (while many of Burdick's examples have been changed in the last 100 years of jurisprudence, it is instructive to note its publication contemporaneous to the Oklahoma Constitution and listing as many as twenty categories of harms in fact without a corresponding tort, and including as examples, acts of the state, arrest of innocent persons, acts with plaintiff's assent, accident, business competition, defense of self, defense of family, defense of property, fright, police power, acts of an incompetent, certain officers, legalized nuisances, mental anguish, arising from plaintiff's illegal conduct, and others).

23. *Black's Law Dictionary,* 393 (6th ed. 1990), defines *damnum absque injuria* as follows: "Loss, hurt, or harm without injury in the legal sense; that is, without such breach of duty as is redressible by a legal action. A loss or injury which does not give rise to an action for damages against the person causing it." *See Spiek v. Michigan Dept. of Transportation*, 456 Mich. 331, 572 N.W. 2d 201, 208 (quoting *Black's Law Dictionary,* 6th ed.). *See also Southwestern Bell Telephone, L.P. v. Harris County Toll Road Authority*, 52 Tex. Sup. Ct. J. 579, 282 S.W.3d 59, n. 3 (2009) ("*Damnum absque injuria*, or *damage sine injuria*, means a '[l]oss or harm that is incurred from something other than a wrongful act and occasions no legal remedy.'") quoting *Black's Law Dictionary,* 420 – 21 (8th ed.2004).

24. *See, e.g., Morgan v. Norfolk S. R. Co.*, 98 N.C. 247, 3 S.E. 506 (1887) (harm in fact was *damnum absque injuria* when caused by noise reasonably necessary to operation of railway); *Cook v. Chapman,* 41 N.J. Eq. 152, 14 Stewart 152, 2 A. 286, 291 (1886) ("There is such a thing known to the law as damage without injury, and this occurs where damage results from an act or omission which the law does not esteem an injury."); *Jacobus v. Colgate,* 217 N.Y. 235, 111 N.E. 837, Ann.Cas.1917E, 369 (1916) (Judge Cardozo writing for the court and explaining plaintiff's action based upon a trespass in another state, although cognizable when filed in New York pursuant to statute, the action was not authorized in 1882 when the trespass occurred (or until the 1913 statute), and while a party had "a moral right to redress" "he had no legal right to redress" until creation of the statute which had to be treated as prospective).

25. *See, e.g., Ridings v. Maze,* 2018 OK 18, ¶¶ 11-12, 414 P.3d 385, 838-839 (when the basis for liability rests solely on the fact that plaintiffs witnessed an accident, and the basis does not include an allegation a defendant physically injured them *(i.e.*, they possess the status of "direct victims"), then plaintiffs have no basis for recovery and their claims for emotional distress).

26. *Cf. St. Paul Fire & Marine Ins. Co. v. Getty Oil,* 1989 OK 139, 782 P.2d 915, 919 (Okla. Const. Art. 2, § 6 does not promise a remedy to every complainant, but requires a complainant must be given access to a court if he or she has suffered a wrong which is recognized in the law; and any other interpretation would render meaningless Okla. Const. Art. 5, § 36).

27. Kyle Graham, *Why Torts Die,* 35 Fla. St. U. L. Rev. 382, n. 151 (2008) (some torts die because they are attacked "as being out of step with the perceived goals of tort law, such as the allocation of measured compensation to injured parties"), citing John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 Geo. L.J. 513, 525 (2003) ("the function of tort law is to compensate and deter" and tort law "has moved from being an institution for the adjudication of private wrongs to an institution that empowers judges and juries to legislate for the public good"); Jeffrey O'Connell & Christopher J. Robinette, *The Role of Compensation in Personal Injury Tort Law: A Response to the Opposite Concerns of Gary Schwartz and Patrick Atiyah,* 32 Conn. L. Rev. 137, 139 (1999) (a mixed theory of tort law must include not only deterrence and corrective justice but also compensation).

28. *Lockhart v. Loosen*, 1997 OK 103, ¶ 7, 943 P.2d 1074, 1083. *See also Lynn v. Shaw*, 1980 OK 179, 620 P.2d 899, 901 (three types of actions involving interference with the husband's interests, as well as a wife's under 32 O.S. 1971 § 15 of the Married Women's Act, renumbered by Laws 1989 c. 333, § 2, eff. Nov. 1, 1989, as 43 O.S. § 214, "enticement, criminal conversation, and alienation of affections;" and concluding tort of seduction includes criminal conversation); *Quinn v. Walsh*, 49 Mass.App.Ct. 696, 732 N.E.2d 330, n. 9, 334 (2000) (damages in connection with such actions such as criminal conversation and alienation of affection have derisively been called heart balm) citing Prosser & Keeton, Torts § 124, at 929 (5th ed. 1984).

29. *See, e.g., Kohler v. Campbell,* 1953 OK 399, 258 P.2d 1178 (judgment for plaintiff in suit based on alienation of affections affirmed by the Court).

30. 76 O. S. Supp.1976 § 8.1: "From and after the effective date of this act, the alienation of the affections of a spouse of sound mind and legal age or seduction of any person of sound mind and legal age is hereby abolished as a civil cause of action in this state."

31. *Davis Oil Co. v. Cloud,* 1986 OK 73, 766 P.2d 1347.

32. Numerous examples could be used to show legislative alteration of liability. *See, e.g., Sudbury v. Deterding*, 2001 OK 10, ¶ 19, 19 P.3d 856, 860 (statutorily increasing potential damages from three times the actual damages to include up to ten times the actual damages altered the liability of the defendant and was not merely remedial).

33. *Lafalier v. Lead-Impacted Communities Relocation Assistance Trust*, 2010 OK 48, ¶ 19, 237 P.3d 181, 190 (Okla. Const. Art 5 § 36 vests the Legislature with the authority to define what constitutes an actionable wrong, provided of course, that such legislation may not disturb a vested right) quoting *St. Paul Fire & Marine Insurance Co. v. Getty Oil Co.*, 1989 OK 139, 782 P.2d 915, 918.

Okla. Const. Art. 5, § 36: "The authority of the Legislature shall extend to all rightful subjects of legislation, and any specific grant of authority in this Constitution, upon any subject whatsoever, shall not work a restriction, limitation, or exclusion of such authority upon the same or any other subject or subjects whatsoever."

34. *Torres v. Seaboard Foods, LLC*, 2016 OK 20, ¶ 22, 373 P.3d 1057, 1068-1069.

35. The burden to show the presence of a constitutional flaw in a statute is on the party who asserts its unconstitutionality. *Torres v. Seaboard Foods, LLC*, 2016 OK ¶ 17, n. 16, 373 P.3d at 1067, citing *CDR Systems Corp. v. Oklahoma Tax Commission*, 2014 OK 31, ¶ 10, 339 P.3d 848, 852, quoting *Thomas v. Henry*, 2011 OK 53, ¶ 8, 260 P.3d 1251, 1254. *In re Initiative Petition No. 397, State Question No. 767*, 2014 OK 23, ¶ 39, 326 P.3d 496, 512.

36. *Rogers v. Quiktrip Corp.*, 2010 OK 3, ¶ 7, 230 P.3d 853, 857-858 (generally, public rights arise between the government and others, while the liability of one individual to another is considered to involve private rights where the public interest is not involved).

This clash in core values is described in Alexandra B. Klass, *Tort Experiments in the Laboratories of Democracy*, 50 Wm. & Mary L. Rev. 1501, 1508-1509 (2009), where the author describes "two camps" of tort

scholars: (1) those who view tort law as merely a branch of the public regulatory state with a goal of identifying and achieving the most cost-effective mix of precaution and injury, and also include those who see tort law as a mechanism to distribute losses, provide compensation to victims of accidents, further social justice, and punish corporate misconduct; and (2) those who view tort as private law to redress private wrongs and obtain corrective justice.

37. *See, e.g., Sebelius v. Cloer,* 569 U.S. 369, 372, 133 S.Ct. 1886, 185 L.Ed.2d 1003 (2013) ("The NCVIA [National Childhood Vaccine Injury Act] establishes a no-fault compensation program designed to work faster and with greater ease than the civil tort system.") (internal quotes omitted and explanation added); 42 U.S.C.A. § 300aa-15(e)(1) (the Vaccine Act provides: "For actual and projected pain and suffering and emotional distress from the vaccine-related injury, an award not to exceed $250,000."); *Maxwell v. Sprint PCS,* 2016 OK 41, ¶ 25, 369 P.3d 1079 (The Administrative Workers' Compensation Act and its predecessor the Workers' Compensation Code relies on the employee relinquishing a common-law right to bring an action in district court and the employer relinquishing certain common-law defenses as part of the statutory no-fault compensation scheme.); *Hughes Drilling Co. v. Crawford,* 1985 OK 16, 697 P.2d 525 (exclusivity of workers' compensation remedy discussed).

38. Robert L. Rabin, *The Renaissance of Accident Law Plans Revisited*, 64 Md. L. Rev. 699, 708 (2005) (Professor Rabin stated the Vaccine Compensation Fund arose out of "a crisis atmosphere" in which "the individual rights perspective of tort yielded to a collective, insurance-based model of compensation.").

39. *See, e.g.*, Leonard J. Nelson, III, David J. Becker, and Michael A. Morrisey, *Medical Liability and Health Care Reform*, 21 Health Matrix 443, 462 (2011) (discussing insurance premium volatility and damages caps with a suggestion "there is greater insurance market stability in states with caps on non-economic damages").

40. Scott DeVito & Andrew Jurs, *An Overreaction to a Nonexistent Problem: Empirical Analysis of Tort Reform from the 1980s to 2000s*, 3 Stan. J. Complex Litig. 62, 103-09 (2015) (finding that after a tort reform damages cap is removed, there is not a rebound effect and filings continue to decline).

41. Yotam Kaplan, *In Defense of Compensation*, 70 Ala. L. Rev. 573, 587 (2018).

42. *L.D.G., Inc. v. Brown*, 211 P.3d 1110 (Alaska 2009) (Court determined a party's right to a trial by jury, right to equal protection, and the right to jury fact-finding were not violated by a noneconomic damages cap in the amount of $400,000 or the injured person's life expectancy in years multiplied by $8,000, whichever was greater, for damages arising out of a single injury or death.).

43. *Kirkland v. Blaine County Med. Ctr.*, 134 Idaho 464, 471, 4 P.3d 1115 (2000) (cap on noneconomic damages imposed is simply a modification of a common law remedy and does not infringe on the right of a jury to decide cases, or constitute special legislation, or arbitrarily discriminate between victims based upon severity of injury, or violate separation of powers principles, or infringe the judiciary's power of remittitur).

44. *Miller v. Johnson*, 295 Kan. 636, 289 P.3d 1098 (2012) ($250,000 cap on noneconomic damages does not violate separation of powers, right to trial by jury or right to a remedy or equal protection).

45. *Gourley ex rel. Gourley v. Nebraska Methodist Health System, Inc.1. Gourley ex rel. Gourley v. Nebraska Methodist Health System, Inc.*, 265 Neb. 918, 663 N.W.2d 43 (Neb. 2003) (statutory cap of $1,250,000 on damages recoverable in medical malpractice action did not constitute special legislation, or violate equal protection, or violate the open court's guarantee, or a right to a jury trial, or take property for public use without compensation, or act as a legislative remittitur).

46. *Simpkins v. Grace Brethren Church of Delaware*, 149 Ohio St.3d 307, 2016-Ohio-8118, 75 N.E.3d 122 (2016) (French, J., with Kennedy, J., concurring, and Lanzinger, J., concurring in judgment only and not in constitutional analysis, and stating a cap on noneconomic damages did not violate a right to trial by jury, right to remedy, right to due process, or a right to equal protection).

47. *Judd v. Drezga*, 103 P.3d 135 (Utah 2004) (statutory cap of $250,000 on noneconomic damages did not violate constitutional open courts clause, equal protection, due process, right to a jury trial or a separation of powers doctrine).

48. *Pulliam v. Coastal Emergency Serv., Inc.*, 257 Va. 1, 509 S.E. 2d 307, 311-312 (1999) (cap on damages varying over time from $1.5 million in 1999 to $2.95 million in the year 2030 (Va.Code Ann. § 8.01-581.15, amended 2011) does not violate due process, right to a jury trial, separation of powers, prohibition on special legislation, or equal protection), reaffirming the court's previous holding in *Etheridge v. Medical Center Hospitals*, 237 Va. 87, 376 S.E.2d 525 (1989).

49. *Mayo v. Wisconsin Injured Patients and Families Compensation Fund*, 2018 WI 78, ¶¶ 5-7, 914 N.W.2d 678, 684-685 (2018) (statutory cap of $750,000 on noneconomic damages was not unconstitutional when a state comprehensive system required each health care provider to maintain liability coverage in the amount of one million dollars per claim, three million dollars for all claims in a given policy year, and a fund provided payments after a mandatory liability coverage was exceeded, and where the medical providers were not personally liable for medical malpractice), *overruling Ferdon ex rel. Petrucelli v. Wisconsin Patients Compensation Fund*, 284 Wis.2d 573, 701 N.W.2d 440 (2005).

50. *Johnson v. St. Vincent Hosp., Inc.*, 273 Ind. 374, 404 N.E.2d 585 (1980), *overruled on other grounds, In re Stephens,* 867 N.E.2d 148 (Ind. 2007).

51. Indiana's Medical Malpractice Act, applicable to acts of malpractice after June 30, 1975, provided medical providers a $250,000 limitation on medical malpractice liability until July 1, 2017, and now specifies a $400,000 limit which will increase to $500,000 on June 30, 2019. Ind. Code § 34-18-14-3.

The Indiana Patient's Compensation Fund provides compensation for damages in excess of the required malpractice policy limits. Ind. Code § 34-18-14-3 ($500,000 before 1990; $750,000 after December 31, 1989 and before July 1, 1999; $1,250,000 between June 30, 1999 and July 1, 2017; $1,650,000 between June 30, 2017 and July 1, 2019; and $1,800,000 for an act of medical malpractice after June 30, 2019); *McDaniel v. Robertson*, 83 N.E.3d 765 (Ind. Ct. App. 2017) (discussing procedure for liability of the Patient's Compensation Fund after settlement with provider and upon payment of malpractice policy limits).

52. Carol A. Crocca, *Validity, Construction, and Application of State Statutory Provisions Limiting Amount of Recovery in Medical Malpractice Claims*, 26 ALR5th 245 (1995).

53. *Compare Schmidt v. Ramsey*, 860 F.3d 1038, 1048-1049 (8th Cir. 2017) *cert. denied sub nom. S. S. ex rel. Schmidt v. Bellevue Med. Ctr. L.L.C.,* ___ U.S. ___, 138 S. Ct. 506, 199 L.Ed2d 386 (2017) (discussing capped damages, substitute remedy (*quid pro quo)*, and the Court's opinion in *Duke Power Co. v. Carolina Environmental Study Group, Inc*., 438 U.S. 59, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978), for the proposition that a person has no property or vested interest in any rule of the common law), *Carlson v. Green*, 446 U.S. 14, 18-19, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980) (discussion of Congress providing an alternative remedy as a substitute for a claim based upon deprivation of a constitutional right), *Stallings v. Oklahoma Tax Com'n*, 1994 OK 99, 880 P.2d 912, 918 (a pre-deprivation or post-deprivation remedy is a constitutionally sufficient remedy for a claim based upon an unconstitutional tax); *Davis Oil Co. v. Cloud*, 1986 OK 73, 766 P.2d 1347, 1350 (approving the principle that no person has a vested right in a rule of law providing a common law defense); *Miller v. Johnson,* 295 Kan. 636, 289 P.3d 1098, 1112-1118 (2012) (a *quid pro quo* analysis is proper to determine whether legislature properly exercised power to modify a right to jury trial).

A comprehensive statutory public interest scheme may involve a *quid pro quo* alteration of legal rights/liabilities. *See, e.g., Waltrip v. Osage Million Dollar Elm Casino*, 2012 OK 65,¶ 11, 290 P.3d 741 (workers' compensation is the product of a *quid pro quo*); *Young v. Station 27, Inc.,* 2017 OK 68, ¶ 20, 404 P.3d 829 (workers' compensation statutes are enacted within the police power of the state to accomplish public policy goals based upon public interests).

A legal duty giving rise to liability corresponds to a correlative legal right secured by a legal remedy. *Hensley v. State Farm Fire and Casualty Company*, 2017 OK 57, n. 17, 398 P.3d 11, citing *Silver v. Slusher,* 1988 OK 53, n. 28, 770 P.2d 878, 884; W. Hohfeld, *Fundamental Legal Conceptions*, 78 (1923) (explaining a right may have a correlative negative or positive legal duty based upon the right at issue), and Leake, *Law of Property in Land*, 1-2 (1st ed., 1874).

54. *Smith v. Department of Ins.*, 507 So.2d 1080 (Fla.1987) (A *per curiam* opinion, Shaw, Grimes, and Kogan, JJ., concurring, and Overton, Acting C.J., specially concurring) (A cap of $450,000 on noneconomic damages unconstitutionally denied plaintiffs access to court as that right related to a right to a jury trial when the statutory cap was not combined with either (1) a statutory reasonable alternative remedy or commensurate benefit for plaintiffs, or (2) legislative showing of (a) overpowering public necessity for the abolishment of the right to damages in excess of the cap and (b) no alternative method of meeting such public necessity; but the cap did not violate a separation of powers principle.).

See also Estate of McCall v. U.S., 134 So.3d 894, 901 (2013) (plurality opinion by Lewis, J., with Labarga, J., concurring; Pariente, Quince, and Perry, JJ., concurring in result) (In a wrongful death action the statutory caps on noneconomic damages in the amount of $500,000 and 1,000,000 involving death violate equal protection because the caps impose unfair and illogical burdens on injured parties when an act of medical negligence gives rise to multiple claimants), citing *St. Mary's Hospital, Inc. v. Phillipe*, 769 So.2d 961 (Fla.2000) (aggregate caps or limitations on noneconomic damages violate equal protection guar-

antees under the Florida Constitution when applied without regard to the number of claimants entitled to recovery).

55. *Lebron v. Gottlieb Memorial Hospital,* 237 Ill. 2d 217, 341 Ill.Dec. 381, 930 N.E.2d 895 (2010) ($1,000,000 hospital cap and $500,000 physician cap violated separation of powers clause by acting as a legislative remittitur and encroaching on a fundamental judicial prerogative).

56. *Knowles ex rel. Knowles v. United States*, 1996 SD 10, ¶¶ 31-33, 544 N.W.2d 183, 191 (cap on all damages in the amount of $1,000,000 violates due process by dividing medical claimants into two classes unconstitutional without sufficient reason even if the existence of an insurance crisis would support a $500,000 cap on noneconomic damages).

57. *Sofie v. Fibreboard Corp.*, 112 Wash.2d 636, 771 P.2d 711, 720-21 (1989) (en banc) modified on other grounds, 780 P.2d 260 (1989) (a cap on noneconomic damages violated a party's right to a jury trial).

58. *Watts v. Lester E. Cox Medical Centers,* 376 S.W.3d 633, 636 (Mo. en banc 2012) (Court held the statutory cap on noneconomic damages was unconstitutional because when the state constitution was adopted in 1820 a jury had a constitutionally protected purpose to determining the amount of damages sustained by an injured party, and the cap violated a party's right to trial by jury.), *overruling Adams By and Through Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898, 907 (Mo. en banc 1992); *Lewellen v. Franklin,* 441 S.W. 3d 136 (Mo. en banc 2014) (cap on punitive damages to $500,000 or five times the amount of the judgment did not violate plaintiff's rights to trial by jury or due process); *Dieser v. St. Anthony's Medical Center,* 498 S.W.3d 419, 434 (2016) (stating post-judgment interest has never been assessed by a jury at common law).

59. *Lucas v. United States*, 757 S.W.2d 687 (Tex.1988) ($500,000 caps on noneconomic damages violated open courts provision of state constitution); *Watson v. Hortman*, 844 F. SupP.2d 795 (E.D. Tex. 2012) (after a state constitutional amendment the court rejected contention the noneconomic damage caps of $250,000/$500,000 violated the U.S. Const. Fifth Amendment Takings Clause or the right to access courts); Michael S. Hull, et al., *House Bill 4 and Proposition 12: An Analysis with Legislative History, Part One: Background and Review*, 36 Tex. Tech L. Rev. 1, 7 (2005) (history of tort reform in Texas and noting constitutional amendment).

60. Shaakirrah R. Sanders, *Deconstructing Juryless Fact-Finding in Civil Cases*, 25 Wm. & Mary Bill Rts. J. 235, 258-259 & n.160 (2016).

61. *Sudbury v. Deterding*, 2001 OK 10, ¶ 8, 19 P.3d 856 (The general rule is that when a statute has been adopted from another state, the judicial construction of that statute by the highest court of the jurisdiction from which the statute is taken accompanies it, and is treated as incorporated); *Baskin v. State*, 1925 OK 1, 40 A.L.R. 941, 232 P. 388, 389 (our State Constitution is not identical in every respect to the constitutions of other states, and this Court noted a party's brief explaining Okla. Const. Art. 5 § 23 was different from the similar provisions in various states). Cf. Winston v. Stewart & Elder, P.C., 2002 OK 68, ¶ 23, 55 P.3d 1063 (Court may use a federal court's construction of a federal counterpart to a similar provision in the Oklahoma Pleading Code).

62. *Parsons v. Volkswagen of America, Inc.*, 2014 OK 111, ¶¶ 13, 39, 341 P.3d 662.

63. The parties and *amici curiae* invoke *sub silentio* different elements of teleological and conflicting considerations with balancing of goals/results interests, Platonic Ideal definition of legislative powers and personal constitutional rights, and a lexical ordering of interests/rights in a contested hierarchy of values with higher ordered interests/rights dominating the lower levels. The arguments by the parties and *amici curiae* are not necessarily internally consistent, but this is not improper on their part as they are advocating alternative methods for the Court to use for reaching their respective litigation goals. *Cf.* Curtis Nyquist, *Re-Reading Legal Realism and Tracing a Genealogy of Balancing,* 65 Buff. L. Rev. 771 (2017) (discussing a difference between *teleological balancing* and *conflicting considerations* in the context of judicial decision-making involving parties with opposed interests); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 Colum. L. Rev. 857, 873 (1999) (challenges a court using "rights-essentialist" Platonic Ideal view of a constitutional right as inconsistent with "actual judicial practice"); Jeffrey L. Harrison, *Egoism, Altruism, and Market Illusions: The Limits of Law and Economics*, 33 UCLA L.Rev. 1309, 1329-1330 (1986) (explaining the idea of "lexical ordering," where values that are afforded priority are not interchangeable with others and the judicially cognizable values must be arranged in hierarchies for enforcement); Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning,* 119 Harv. L.Rev. 1274, 1314 (2006) (explaining Levinson's "pragmatist position" and stating it is confusing to postulate a constitutional right using a Platonic Ideal definition because if no judicial enforcement method (or remedy) exists in a court under a doctrinal test for that right so defined then the right does not exist either.)

64. *Torres v. Seaboard Foods, LLC*, 2016 OK 20, ¶ 35, 373 P.3d 1057, 1075 (decisions concerning public policy in creating and abolishing causes of action are routinely within the judgment of the Legislature; and this Court has a long history of recognizing the Legislature's power to alter private personal rights in contexts of creating or abolishing a cause of action). *See, e.g., Williams v. Hook*, 1990 OK 136, 804 P.2d 1131 (loss of parental consortium); *Burk v. K-Mart Corp.*, 1989 OK 22, 770 P.2d 24 (employment termination contrary to public policy).

The Court's recognition of the involvement of public interests in defining a cause of action explains in part why the Court has characterized the judicial creation of a cause of action as an act of "judicial legislation." *Hill v. Graham*, 1967 OK 10, 424 P.2d 35, 38 (judicial creation of a cause of action was characterized as "judicial legislation"). *See also Karriman v. Orthopedic Clinic*, 1971 OK 83, 488 P.2d 1250, 1251-1252, 1252 (the Court declined to recognize a cause of action which had not been created by the Legislature, and Justice Jackson's separate concurring specially opinion in that case explained the creation of a cause of action is a legislative decision and not a function of the judiciary).

65. *See, e.g., Bohannan v. Allstate Ins. Co.*, 1991 OK 54, 820 P.2d 787 (the requirements of 36 O.S.1981 § 3636 is to assure contracted coverage for personal injury damages); 70 O.S.2011 § 4313 (Okla. Op. Atty. Gen. No. 74-221 (Feb. 7, 1975), explaining 70 O.S. § 4313 authorized boards of regents to purchase general liability insurance for claims involving bodily injury or property damage).

66. I have addressed the argument of plaintiffs that they are constitutionally entitled to *full* compensation for their injury. However, I am also compelled to note the fact a valid "pubic purpose" may be achieved although private parties receive a benefit from legislation and others a detriment. As the High Court has stated: "Any number of cases illustrate that the achievement of a public good often coincides with the immediate benefitting of private parties." *Kelo v. City of New London, Conn.*, 545 U.S. 469, 485, n. 14, 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005) citing *National Railroad Passenger Corporation v. Boston & Maine Corp.*, 503 U.S. 407, 422, 112 S.Ct. 1394, 118 L.Ed.2d 52 (1992) (public purpose of "facilitating Amtrak's rail service" served by taking rail track from one private company and transferring it to another private company); *Brown v. Legal Foundation of Wash.*, 538 U.S. 216, 123 S.Ct. 1406, 155 L.Ed.2d 376 (2003) (provision of legal services to the poor is a valid public purpose); *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984).

67. 1989 OK 139, 782 P.2d 915.

68. 1988 OK 88, 760 P.2d 816.

69. *St. Paul Fire & Marine Ins. Co. v. Getty Oil*, 1989 OK 139, 782 P.2d 915, 920 (by defining the perimeters of the substantive right a statute of repose "in effect adds an additional element to tort claims enumerated thereunder"); *Neer v. State ex rel. Oklahoma Tax Comm'n*, 1999 OK 41, ¶ 19, 982 P.2d 1071, 1078-1029 (defining a statute of repose).

70. *St. Paul Fire & Marine Ins. Co.*, 1989 OK 139, 782 P.2d at 915, 919 ("in the early days of statehood such a statute [of repose] was unknown").

71. Okla. Const. Art. 5 § 46:

The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law authorizing:

The creation, extension, or impairing of liens;

Regulating the affairs of counties, cities, towns, wards, or school districts;

Changing the names of persons or places;

Authorizing the laying out, opening, altering, or maintaining of roads, highways, streets, or alleys;

Relating to ferries or bridges, or incorporating ferry or bridge companies, except for the erection of bridges crossing streams which form boundaries between this and any other state;

Vacating roads, town plats, streets, or alleys;

Relating to cemeteries, graveyards, or public grounds not owned by the State;

Authorizing the adoption or legitimation of children;

Locating or changing county seats;

Incorporating cities, towns, or villages, or changing their charters;

For the opening and conducting of elections, or fixing or changing the places of voting;

Granting divorces;

Creating offices, or prescribing the powers and duties of officers, in counties, cities, towns, election or school districts;

Changing the law of descent or succession;

Regulating the practice or jurisdiction of, or changing the rules of evidence in judicial proceedings or inquiry before the courts, justices of the peace, sheriffs, commissioners, arbitrators, or other tribunals, or providing or changing the methods for the collection of debts, or the enforcement of judgments or prescribing the effect of judicial sales of real estate;

Regulating the fees, or extending the powers and duties of aldermen, justices of the peace, or constables;

Regulating the management of public schools, the building or repairing of school houses, and the raising of money for such purposes;

Fixing the rate of interest;

Affecting the estates of minors, or persons under disability;

Remitting fines, penalties and forfeitures, and refunding moneys legally paid into the treasury;

Exempting property from taxation;

Declaring any named person of age;

Extending the time for the assessment or collection of taxes, or otherwise relieving any assessor or collector of taxes from due performance of his official duties, or his securities from liability;

Giving effect to informal or invalid wills or deeds;

Summoning or impaneling grand or petit juries;

For limitation of civil or criminal actions;

For incorporating railroads or other works of internal improvements;

Providing for change of venue in civil and criminal cases.

72. *St. Paul Fire & Marine Ins. Co.*, 1989 OK 139, 782 P.2d at 921-922.

73. *Lafalier v. Lead-Impacted Communities Relocation Assistance Trust*, 2010 OK 48, ¶ 26, 237 P.3d 181, 192.

74. When explaining a choice-of-law issue in 2003 we stated the affirmative defense of comparative negligence could not be separated from the tort (cause of action) for which it was a defense. *See, e.g., Hightower v. Kansas City Southern Ry. Co.*, 2003 OK 45, ¶ 10, 70 P.3d 835, 842, relying on *Brickner v. Gooden*, 1974 OK 91, 525 P.2d 632, 637. *Cf. Mansfield v. Circle K. Corp.*, 1994 OK 80, n. 16, 877 P.2d 1130, 1136 (Oklahoma Legislature created the defense of comparative negligence). *Cf. Clark v. Cassidy*, 64 Haw. 74, 636 P.2d 1344, 1346-1347 (1981) (Substantive rights are generally defined as rights which take away or impair vested rights acquired under existing laws, or create a new obligation, impose a new duty, or attach a new disability in respect to transactions or considerations already past, as distinguished from remedies or procedural laws which merely prescribe methods of enforcing or giving effect to existing rights).

75. *Racher v. Westlake Nursing Home Ltd. P'ship*, 871 F.3d 1152, 1162 (10th Cir. 2017) citing *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 428, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996).

76. *Racher v. Westlake Nursing Home Ltd. P'ship*, 871 F.3d 1152, 1162 (10th Cir. 2017) citing *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996) and *James River Ins. Co. v. Rapid Funding, LLC*, 658 F.3d 1207, 1216 – 17 (10th Cir. 2011) (federal courts must apply state substantive law in diversity cases).

77. *Racher v. Westlake Nursing Home Ltd. P'ship*, 871 F.3d at 1161, 1165-1167.

78. *Liddell v. Heavner*, 2008 OK 6, ¶ 16, 180 P.3d1191, 1199.

79. The essential elements of a negligence cause of action are duty, breach, causation, and damages. *Brigance v. Velvet Dove Restaurant, Inc.*, 1986 OK 41, 725 P.2d 300, 306. *Cf.* Dan B. Dobbs, Paul T. Hayden and Ellen M. Burdick, *The Law of Torts*, § 124 (2d ed., as updated 2018) (elements of a tort *prima facie* case for negligence include duty, breach, harm caused in fact, breach was proximate cause of harm, damages based on actual harm when damages are "legally recognized"). *See also* note 19 herein and *Anagnost v. Tomecek, supra*.

80. *Zeier v. Zimmer, Inc.*, 2006 OK 98, ¶ 13, 152 P.3d 861; *State ex rel. Macy v. Bd. of County Comm'rs of Okla. County*, 1999 OK 53, ¶ 14, 986 P.2d 1130.

81. *Lee v. Bueno*, 2016 OK 97, ¶ 12, 381 P.3d 736, 742.

82. *Lee v. Bueno*, 2016 OK 97, at ¶ 9, 381 P.3d at 741.

83. *Lee v. Bueno*, 2016 OK 97, at ¶ 24, 381 P.3d at 745.

84. 2014 OK 118, 341 P.3d 660.

85. 2014 OK 118, at ¶ 7, 341 P.3d at 662.

86. 2014 OK 118, at ¶ 3, 341 P.3d at 661.

87. *See, e.g., Sullins v. American Medical Response of Oklahoma, Inc.*, 2001 OK 20, 23 P.3d 259, 266-267 (governmental tort liability is governed by the power of the Legislature); *Gladstone v. Bartlesville Independent School Dist. No. 30 (I-30)*, 2003 OK 30, 66 P.3d 442, (Legislature's creation of sovereign immunity and its exceptions did not violate equal protection); *Jarvis v. City of Stillwater*, 1987 OK 5, 732 P.2d 470, 473 (six-month time bar in 51 O.S.1981 § 156(C) of the Political Subdivision Tort Claims Act, (an Act including statutory caps on damages), did not violate Art. 5 § 46); *Black v. Ball Janitorial Service, Inc.*, 1986 OK 75, 730 P.2d 510, 515, (special law provision in Okla. Const. Art 5 § 59 as it related to the Political Subdivision Tort Claims Act, 51 O.S.1981 §§ 151-170, was not violated because the classification was reasonable for the attainment of a legitimate objective and operates uniformly upon all members of the class).

88. *See, e.g., Oklahoma Dept. of Securities ex rel. Faught v. Blair*, 2010 OK 16, n. 22, 231 P.3d 645, 658 (jurisdictional power to render the particular judgment involves the compliance with law mandatory for the existence of a judgment).

89. *Weaber v. City of Perry*, 1932 OK 819, 16 P.2d 883, 884.

90. 23 O.S.2011 § 61.2(C).

91. *Powers v. District Court of Tulsa County*, 2009 OK 91, ¶ 28, 227 P.3d 1060, 1078 (Court construes statutes, if possible, to be consistent with constitutional provisions). *Cf. Crowell v. Benson*, 285 U.S. 22, 62, 52 S.Ct. 285, 76 L.Ed. 598 (1932) (when the validity of an act of the Congress is drawn in question it is a cardinal principle that the Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided).

Due to my conclusion I need not address a hypothetical issue raising the constitutional scope and nature of a legislatively created mandatory and jurisdictional limitation imposed on a District Court's jurisdiction over a common law cause of action and a party's right to a jury trial. *Gaasch Estate of Gaasch v. St. Paul Fire and Marine Insurance Company*, 2018 OK 12, n. 23, 412 P.3d 1151, 1157 (Court does not address hypothetical issues in an appeal).

92. *See, e.g., Hightower v. Kansas City Southern Ry. Co.*, 2003 OK 45, ¶ 10, 70 P.3d 835, 842, relying on *Brickner v. Gooden*, 1974 OK 91, 525 P.2d 632, 637. *Cf. Mansfield v. Circle K. Corp.*, 1994 OK 80, n. 16, 877 P.2d 1130, 1136 (Oklahoma Legislature created the defense of comparative negligence).

93. *Smith v. Jenkins*, 1994 OK 43, 873 P.2d 1044, 1046-1047 (Oklahoma's modified comparative negligence statutory scheme apportions loss and damages among those whose fault contributed to the harm-dealing event). *Cf. Davis v. CMS Continental Natural Gas, Inc.*, 2001 OK 33, n. 4, 23 P.3d 288, 290 (explaining the statutory comparative negligence scheme authorized party who was not more than fifty percent negligent to recover a percentage of damages sustained).

94. *Harris v. V.S. Cook Lumber*, 1931 OK 524, 3 P.2d 694, 703. *See, e.g., Weatherly v. Higgins*, 6 Ind. 73 (1854) (jury returned a special verdict setting out facts but did not specify the amount of damages to awarded in the judgment, and then the court assessed the amount of damages and rendered judgment for plaintiff).

95. *Smith v. Gizzi*, 1977 OK 91, 564 P.2d 1009, 1013, citing V*aught v. Holland*, 1976 OK 119, 554 P.2d 1174, 1177 (the fact interrogatories, which amount to submitting the general issues on which the parties are entitled to recover, were submitted to jury instead of general forms of verdict will not, alone, necessarily work a reversal of a judgment based upon answers given by the jury to the interrogatories).

96. *Bierman v. Aramark Refreshment Servs., Inc.*, 2008 OK 29, ¶ 22, 198 P.3d 877, 884.

97. *C & H Power Line Constr. Co. v. Enter. Products Operating, LLC*, 2016 OK 102, ¶ 17, 386 P.3d 1027, 1032.

98. *State v. Price*, 2012 OK 51, ¶ 30, 280 P.3d 943, 952-953. *See, e.g., Lee v. Bueno*, 2016 OK 97, ¶ 14, ¶¶ 27-32, 381 P.3d 736 (12 O.S.2011 § 3009.1, stating when medical bills are admissible in evidence and allowing evidence of bills a plaintiff *actually owes* a medical provider and also allowing in evidence amounts plaintiff *actually paid*, does not violate Okla. Const. Art. 2 § 19).

99. *Death of Lofton v. Green*, 1995 OK 109, 905 P.2d 790, 793.

100. *Carris v. John R. Thomas and Associates, P.C.*, 1995 OK 33, n. 18, 896 P.2d 522, 529, citing *Park v. Security Bank & Trust Co.*, 1973 OK 72, 512 P.2d 113, 117; *Complete Auto Transit, Inc. v. Reese*, 1967 OK 73, 425 P.2d 465, 470; *Hames v. Anderson*, 1977 OK 191, 571 P.2d 831, 833; *Hardesty v. Andro Corp. – Webster Div.*, 1976 OK 129, 555 P.2d 1030, 1035, *disapproved on other grounds Old Albany Estates, Ltd. v. Highland Carpet Mills, Inc.*, 1979 OK 144, 604 P.2d 849; *First Nat. Bank of Amarillo v. LaJoie*, 1975 OK 95, 86 A.L.R.3d 309, 537 P.2d 1207, 1211.

101. *Chicago, R. I. & P. Ry. Co. v. Stibbs*, 1906 OK 50, 87 P. 293, 295, quoting R*ailroad Company v. Barron*, 72 U. S. (5 Wall.) 90, 105, 18 L. Ed. 591 (1866).

102. *State v. Bowling*, 1923 OK 162, 213 P. 745, 747 (quoting R.L.1910, § 5033 and its language providing for a new trial when a verdict was contrary to law); *Boyd v. Bryan*, 1901 OK 28, 65 P. 940, 941 (Supreme Court for the Territory of Oklahoma explained a motion for new trial may be brought for reason that such is not sustained by sufficient evidence and is contrary to law).

103. 2017 OK 69, ¶ 22, 404 P.3d 843, 853 (notes and authority omitted).

104. J*ohn v. Saint Francis Hospital, Inc.*, 2017 OK 81, ¶ 16, 405 P.3d 681, 688, quoting *Gibby v. Hobby Lobby Stores*, 2017 OK 78, ¶ 5, 404 P.3d 44.

105. *Graham v. D & K Oilfield Services, Inc.*, 2017 OK 72, ¶¶ 29- 30, 404 P.3d 863, 873; *Lafalier v. Lead-Impacted Communities Relocation Assistance Trust*, 2010 OK 48, ¶¶ 18-20, 237 P.3d 181, 190.

106. *John v. Saint Francis Hospital, Inc.*, 2017 OK 81, ¶¶ 16-18, 405 P.3d 681, 687-688 (statute could not be used to deny the constitutional guarantee of court access); *Zeier v. Zimmer, Inc.*, 2006 Ok 98, ¶ 25, 152 P.3d 861, 872 (statute could not be used to deny the constitutional guarantee of court access); *Moses v. Hoebel*, 1982 OK 26, 646 P.2d 601 (court order could not condition payment in one case as condition on plaintiff to file another case).

107. *Johnson v. Board of Governors of Registered Dentists of State of Okla.*, 1996 OK 41, 913 P.2d 1339, 1345, citing *Addington v. Texas*, 441 U.S. 418, 424, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979).

108. *Johnson v. Board of Governors, etc*., 1996 OK 41, 913 P.2d at 1345.

109. *Johnson v. Board of Governors, etc*., 1996 OK 41, 913 P.2d at 1345.

110. *Matter of Adoption of M.A.S.*, 2018 OK 1, ¶ 11, 419 P.3d 204, 208.

111. *State ex rel. Z.D. v. Utah*, 2006 UT 54, 147 P.3d 401, 407.

112. *Lincoln Nat. Life Ins. Co. v. Donaldson, Lufkin & Jenrette Securities Corp.*, 9 F. SupP.2d 994, 1005 (N.D. Ind. 1998) (discussed a heightened pleading requirement) citing *In re First Chicago Corp. v. Securities Litigation,* 769 F.Supp. 1444, 1452 (N.D.Ill.1991) (explaining Fed.R.Civ.Pro. 9(b) has a heightened pleading requirement for fraud and mistake which must be pled with particularity). Plaintiffs also relied on an opinion by Justice Stevens announcing the judgment of the Court in which only Chief Justice Rehnquist joined in *Miller v. Albright*, 523 U.S. 420, 436, 118 S.Ct. 1428, 140 L.Ed2d 575 (1998), with the opinion stating a clear and convincing evidence standard had been incorporated into a federal statute to deter "fraudulent claims."

113. *John v. Saint Francis Hospital, Inc.*, 2017 OK 81, ¶¶ 10-11, 405 P.3d 681, 685-686, explaining *Zeier v. Zimmer,* 2006 OK 98, 152 P.3d 861.

114. Patricia Hatamyar, *The Effect of "Tort Reform" on Tort Case Filings*, 43 Val. U. L. Rev. 559, 592 (2009).

115. Because of my disposition of this claim I need not discuss a court using a fact, either legislative or adjudicative, in a law review article to adjudicate a cause of action in a trial court or a challenge to a judgment on appeal when the fact does not appear on the judgment roll. *But see, e.g., Reeves v. Agee,* 1989 OK 25, n. 15, 769 P.2d 745, 752 (judicial notice, part of our evidence law, is a court's cognizance of an adjudicative fact without any proof and includes matters of common and general knowledge that are well established and authoritatively settled); *Wesley-0Jessen Div. of Schering Corp. v. Bausch & Lomb Inc.*, 698 F.2d 862, 865 (7th Cir.1983) (difference between taking judicial notice of materials as a substitute for evidence and using materials for background information); *Lingad v. Indymac Federal Bank*, 682 F.Supp.2d 1142, 1146 (E.D.Cal. 2010) (to take judicial notice of a fact, it must be either generally known within the territorial jurisdiction of the court or capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably be questioned, and declining to judicially notice a law review article).

116. *Rollings v. Thermodyne Industries, Inc*., 1996 OK 6, 910 P.2d 1030, 1032.

117. *See* my discussion herein and the clash between (1) the view that tort law should prioritize and serve a State-recognized interest to create lower insurance costs, and (2) the view that tort law should prioritize and serve a State-recognized interest requiring every person to be fully compensated in a court of law.

118. The Due Process Section of the Oklahoma Constitution also has an equal protection component. *Oklahoma Ass'n for Equitable Taxation v. City of Oklahoma City*, 1995 OK 62, 901 P.2d 800, n. 29, 805, *cert. denied*, 516 U.S. 1029, 116 S.Ct. 674, 133 L.Ed.2d 523 (1995) ("The same equal protection component found in the fourteenth amendment of the United States Constitution is present in the due process clause of art. 2, § 7.").

119. *Torres v. Seaboard Foods, LLC*, 2016 OK 20, ¶32, & n.2, 373 P.3d 1057, 1074.

120. *Torres v. Seaboard Foods, LLC*, 2016 OK 20, at ¶32, 373 P.3d at 1074.

121. *Torres v. Seaboard Foods, LLC*, 2016 OK 20, at ¶¶ 26, 32.

122. *Matter of Adoption of M.A.S.*, 2018 OK 1, 11, 419 P.3d 204, 208. *See, e.g., Matter of B.K.*, 2017 OK 58, ¶ 37, 398 P.3d 323, 330 (evidence was of such character and quality that the jury could form a firm conviction that the grounds for termination of parental rights were proven by clear and convincing evidence).

123. *In re M. K. T.*, 2016 OK 4, ¶ 47, 368 P.3d 771, 785.

124. *Weaver v. Laub*, 1977 OK 242, 574 P.2d 609, 613-614.

125. *Wilspec Techs., Inc. v. DunAn Holding Grp., Co*., 2009 OK 12, ¶¶ 17-18, 204 P.3d 69, 75 (applying 23 O.S.2001 § 9.1).

126. *Dill v. Rader,* 1978 OK 78, 583 P.2d 496, 499 (the evidence must be clear and convincing in order to make out a *prima facie* case of conspiracy).

127. *Mueggenborg v. Walling*, 1992 OK 121, 836 P.2d 112, 113-114.

128. *Grogan v. KOKH, LLC*, 2011 OK CIV APP 34, ¶ 18, 256 P.3d 1021, 1030 (Approved for Publication by Order of the Supreme Court), (review of a summary judgment motion in a defamation case when a dispute of fact concerns actual malice), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

129. *Brown v. Founders Bank and Trust Co*., 1994 OK 130, n.17, 890 P.2d 855, 862.

130. *Berry and Berry Acquisitions, LLC v. BFN Properties LLC,* 2018 OK 27, ¶ 25, 416 P.3d 1061, 1073.

131. *In re Guardianship of C.D.A*., 2009 OK 47, ¶ 7, 212 P.3d 1207, 1209.

132. *Scott v. Peters*, 2016 OK 108, n. 10, 388 P.3d 699, 703. *See also Hoar v. Aetna Casualty & Surety Co*., 1998 OK 95, ¶ 17, 968 P.2d 1219, 1223 (when clear and convincing evidence is presented Oklahoma permits reformation of a contract, including an insurance contract, to reflect the understanding of the parties in situations where there is fraud, accident or mutual mistake).

133. *State ex rel. Oklahoma Bar Association v. Kruger*, 2018 OK 53, ¶ 2, 421 P.3d 306, 309.

134. Compare *Whillock v. Whillock*, 1976 OK 51, 550 P.2d 558, 560 (clear and convincing standard) with *Henry v. Schmidt*, 2004 OK 34, ¶ 19, 91 P.3d 651 (federal constitutional protections require proof of the offense beyond a reasonable doubt when a penal sanction is imposed).

135. *Wilspec Techs., Inc. v. DunAn Holding Grp., Co.*, 2009 OK 12, ¶ 18, 204 P.3d 69, 75 (in addition to proving the elements of a tort, the plaintiff seeking punitive damages for tortious interference with a contract obligation must prove that the defendant acted either recklessly, intentionally, or maliciously by clear and convincing evidence) (applying 23 O.S.2001 § 9.1).

136. *See, e.g., Schmidt v. U.S.,* 1996 OK 29, 912 P.2d 871, 874 (public policy allowing a party to contractually assume risks related to another person's conduct does not allow contractual assumption of risk for intentional, willful or fraudulent acts, or gross or wanton negligence of another); *Elsken v. Network Multi-Family Sec. Corp*., 1992 OK 136, 838 P.2d 1007, 1009 (the Court noted limitations on liability in burglar alarm contracts did not violate public policy even when applied to a claim of personal injury, but courts have declined to uphold limitation of liability contract clauses when defendant's conduct constituted gross negligence because such would violate public policy).

137. *Johnson v. Board of Governors of Registered Dentists of State of Okla.*, 913 P.2d at 1345, citing *Addington v. Texas*, 441 U.S. 418, 424.

138. *St. Paul Fire & Marine Ins. Co. v. Getty Oil,* 1989 OK 139, 782 P.2d 915, 919-921.

139. Plaintiffs expressly make no substantive due process claim herein or point to facts of record in support thereof. The Court noted in *Torres* that some have argued due process provides both a ceiling on imposing liability and a floor when removing a cause of action. *Torres*, at ¶¶ 24, 36. No claim is made herein that the $350,000 cap is arbitrary in the constitutional sense of being "beneath the due process floor," or that a statutory provision for raising the cap over time as in some states is constitutionally required.

140. *Lee v. Bueno*, 2016 OK 97, ¶ 40, 381 P.3d 736; *Conaghan v. Riverfield Country Day School*, 2007 OK 60, ¶ 20, 163 P.3d 557.

141. 75 O.S.2011 § 11a:

> In the construction of the statutes of this state, the following rules shall be observed:
>
> 1. For any act enacted on or after July 1, 1989, unless there is a provision in the act that the act or any portion thereof or the application of the act shall not be severable, the provisions of every act or application of the act shall be severable. If any provision or application of the act is found to be unconstitutional and void, the remaining provisions or applications of the act shall remain valid, unless the court finds:
>
> a. the valid provisions or application of the act are so essentially and inseparably connected with, and so dependent upon, the void provisions that the court cannot presume the Legislature would have enacted the remaining valid provisions without the void one; or
>
> b. the remaining valid provisions or applications of the act, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.
>
> 2. For acts enacted prior to July 1, 1989, whether or not such acts were enacted with an express provision for severability, it is the intent of the Oklahoma Legislature that the act or any portion of the act or application of the act shall be severable unless:
>
> a. the construction of the provisions or application of the act would be inconsistent with the manifest intent of the Legislature;
>
> b. the court finds the valid provisions of the act are so essentially and inseparably connected with and so dependent upon the void provisions that the court cannot presume the Legislature would have enacted the remaining valid provisions without the void one; or
>
> c. the court finds the remaining valid provisions standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

142. *Hunsucker v. Fallin*, 2017 OK 100, 408 P.3d 599.

143. *Liddell v. Heavner,* 2008 OK 6, ¶ 29, & n. 53, 180 P.3d 1191, 1203, citing *Ethics Commission of State of Okla. v. Cullison*, 1993 OK 37, 850 P.2d 1069, 1077.

144. *See, e.g., U.S. v. Mayer,* 235 U.S. 55, 35 S. Ct. 16, 59 L. Ed. 129 (1914) (discussing federal district court's lack of jurisdiction in particular circumstance); *Bank of Havana v. Magee,* 20 N. Y. 355, 362 (1859)

(every action must be prosecuted in the name of the real party in interest); *Shields v. Barrow*, 58 U.S. (17 How.) 130, 15 L.Ed. 158 (1854) (court noted three classes of parties in equity, formal parties, persons possessing an interest in the controversy who ought to be made formal parties, and persons possessing an interest in the controversy when a final decree may not be entered without affecting that interest or creating a final adjudication inconsistent with equity and good conscience); *Munday v. Vail*, 34 N.J.L. 418 (1871) (judgment upon a matter outside issues of record is beyond the jurisdiction of the court).

145. *Oklahoma Transportation Co. v. Phillips*, 1953 OK 381, 265 P.2d 467.

146. *Missouri Pac. R. Co. v. Steel*, 1929 OK 556, 284 P. 21, 26.

147. *Seay v. Plunkett*, 1914 OK 602, 145 P. 496 (Syllabus by the Court).

148. *Willis v. Cochran*, 1917 OK 462, 168 P. 658 (*ad damnum* may be amended pursuant to Rev. Laws 1910, § 4787, subsequently codified at 12 O.S. § 314, repealed by Laws 1984, c. 164, § 32, eff. Nov. 1, 1984); *Frick-Reid Supply Co. v. Aggers*, 1911 OK 90, 114 P. 622, 623-624 (verdict in excess of the *ad damnum* may be corrected by remittitur); *McDermott v. Severe*, 25 App.D.C. 276, 290 (1905), *aff'd*, 202 U.S. 600, 26 S.Ct. 709, 50 L.Ed. 1162 (1906) (court approved jury instruction stating verdict could not exceed the $25,000 amount alleged as damages); *Sweet v. Excelsior Elec. Co.*, 59 N.J.L. (30 Vroom) 441, 31 A. 721 (1895) (if a declaration for unliquidated damages which contains no indication of the extent of the plaintiff's claim outside of the *ad damnum* clause, then no amendment may occur after trial to authorize a judgment in excess of the *ad damnum); Sheldon v. Sullivan*, 45 Mich. 324, 7 N.W. 900 (1881) (when a defective general *ad damnum* is used at the end of a declaration the *ad damnum* may be amended); *Corning v. Corning*, 6 N. Y. (2 Seld.) 97 (1851) (verdict for $3,000 upon plaintiff's $2,000 *ad damnum* gave plaintiff a right to enter a remittitur for the excess and for the court to enter judgment on the reduced amount and refuse an application for new trial); *Hemmenway v. Hickes*, 21 Mass. (4 Pick.) 497 (1827) (a judgment erroneously rendered for a sum greater than the *ad damnum* could be addressed by remittitur). *Cf. Strahm v. Murry*, 1948 OK 227, 199 P.2d 603, 605 (judgment for damages in an amount greater than that sought in the petition could not be sustained although supported by evidence, when plaintiff's pleading was never amended to conform to the proof in this respect).

149. *Macartney v. Compagnie Generale Transatlantique*, 1958 A.M.C. 819, 253 F.2d 529, 531-532, emphasis added, and explaining *Chesapeake & Ohio R. Co. v. Carnahan*, 241 U.S. 241, 36 S.Ct. 594, 60 L.Ed. 979 (1915); *McDermott v. Severe*, 1905, 202 U.S. 600, 26 S.Ct. 709, 50 L.Ed. 1162 (1905); *Hoffschlaeger Co., Ltd. v. Fraga*, 290 F. 146, 149 (9th Cir. 1923).

150. *Oldenburg v. Clark*, 489 F.2d 839, 843 (10th Cir. 1974) citing *Chesapeake & O.R. v. Carnahan*, 241 U.S. 241, 36 S.Ct. 594, 60 L.Ed. 979 (1916); *Dowell, Inc. v. Jowers*, 182 F.2d 576 (5th Cir. 1950); Annot., Instruction Mentioning or Suggesting Specific Sum as Damages in Action for Personal Injury of Death, 2 A.L.R.2d 454.

151. *See, e.g.*, Michael. S. Kang, *Don't Tell Juries About Statutory Damage Caps: The Merits of Nondisclosure*, 66 U. Chi. L. Rev. 469, 470, 472 (1999) (arguing that informing jurors of damage caps will unduly influence jurors and distort damage awards).

152. *Pierce v. Central Maine Power Co.*, 622 A.2d 80, 83 (Me. 1993).

153. *Brown v. Crown Equipment Corp.*, 445 F.Supp.2d 59, 75-76 (D. Me. 2006) (noting the comment to the instruction by Justice Alexander of the Maine Supreme Judicial Court). *Cf.* Rebecca Hollander-Blumoff & Matthew T. Bodie, *The Effects of Jury Ignorance About Damage Caps: The Case of the 1991 Civil Rights Act*, 90 Iowa L. Rev. 1361, 1369 (2005) (although a particular federal statutory cause of action requires jury ignorance of a cap on damages there was apparently little discussion during enactment why such was necessary or "whether damages are more likely to be moved upward or downward if the caps were to be revealed" to a jury).

154. *Carris v. John R. Thomas and Assoc., P.C.*, 1995 OK 33, 896 P.2d 522, 529.

155. *Fowler v. Lincoln County Conservation Dist.*, 2000 OK 96, ¶ 18, 15 P.3d 502, 508.

156. *Dodson v. Henderson Properties, Inc.*, 1985 OK 71, 708 P.2d 1064, 1066.

157. *See, e.g.*, Douglas Walton, *Ad Hominem Arguments*, (Tuscaloosa; AL: Univ. of Alabama Press, 1998) 33, 51-64 (distinguishing a proper argument alleging bias and used for a credibility determination of a witness with an allegation of bias used to replace a valid premise for the argument asserted).

158. *Hunsucker v. Fallin*, 2017 OK 100, ¶ 37, 408 P.3d 599, 612.

159. *Torres v. Seaboard Foods, LLC*, 2016 OK 20, ¶ 46, 373 P.3d 1057, 1079.

160. *Torres v. Seaboard Foods, LLC*, 2016 OK 20, at n. 49, 373 P.3d at 1072, discussing responses to *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905).

2019 OK 29

RE: Revocation of Certificates of Certified Shorthand Reporters

SCAD-2019-42. April 29, 2019

ORDER

On February 15, 2019, this Court suspended the certificates of several certified shorthand reporters for failure to comply with the continuing education requirements for calendar year 2018 and/or with the annual certificate renewal requirements for 2019. *See* 2019 OK 10 (SCAD 2019-16).

The Oklahoma Board of Examiners of Certified Shorthand Reporters has advised that the court reporters listed below continue to be delinquent in complying with the continuing education and/or annual certificate renewal requirements, and the Board has recommended to the Supreme Court of the State of Oklahoma the revocation of the certificate of each of these reporters, effective April 15, 2019, pursuant to 20 O.S., Chapter 20, App. 1, Rules 20 and 23.

IT IS THEREFORE ORDERED that the certificate of each of the certified shorthand reporters named below is hereby revoked effective April 15, 2019.

Hope Alwardt	CSR #1883
Karen Baker	CSR #1552
Lorena Bishop	CSR #125
David Harjo	CSR #873
Deborah Parker	CSR # 1575
Connie Petrazio	CSR # 1733
Elizabeth Phillips	CSR # 1855
Trulia Taylor	CSR # 2010
Connie Tocco	CSR # 1977

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 29TH day of APRIL, 2019.

/s/ Noma D. Gurich
CHIEF JUSTICE

Gurich, C.J., Darby, V.C.J., Kauger, Winchester, Edmondson, Colbert, Reif and Combs, JJ., concur.

2019 OK 30

RE: Revocation of Credentials of Registered Courtroom Interpreters

SCAD-2019-43. April 29, 2019

ORDER

On February 15, 2019, this Court suspended the certificates of several Registered Courtroom Interpreters for failure to comply with the continuing education requirements for calendar year 2018 and/or with the annual certificate renewal requirements for 2019. *See* 2019 OK 8 (SCAD 2019-17).

The Oklahoma Board of Examiners of Certified Courtroom Interpreters has advised that the interpreters listed below continue to be delinquent in complying with the continuing education and/or annual certificate renewal requirements, and the Board has recommended to the Supreme Court of the State of Oklahoma the revocation of the credential of each of these interpreters, effective April 15, 2019, pursuant to 20 O.S., Chapter 23, App. II, Rules 18 and 20.

IT IS THEREFORE ORDERED that the credential of each of the Registered Courtroom Interpreters named below is hereby revoked effective April 15, 2019.

Linda Allegro

Tania Flores

Emily Salinas

Jazmin Zaragoza

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 29TH day of APRIL, 2019.

/s/ Noma D. Gurich
CHIEF JUSTICE

Gurich, C.J., Darby, V.C.J., Kauger, Winchester, Edmondson, Colbert, Reif and Combs, JJ., concur.

2019 OK 31

RE: Reinstatement of Credentials of Registered Courtroom Interpreters

SCAD-2019-44. April 29, 2019

ORDER

The Oklahoma Board of Examiners of Certified Courtroom Interpreters recommended to the Supreme Court of Oklahoma that the credentials of **Alejandro Miranda** be reinstated as he has complied with the continuing education requirements for 2018 and annual certificate renewal requirements for 2019 and has paid all applicable fees.

IT IS HEREBY ORDERED pursuant to 20 O.S., Chapter 23, App. 1, Rules 18 and 20, the credentials of **Alejandro Miranda** be reinstated from the suspension earlier imposed by this Court:

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 29th day of APRIL, 2019.

/s/ Noma D. Gurich
CHIEF JUSTICE

Gurich, C.J., Darby, V.C.J., Kauger, Winchester, Edmondson, Colbert, Reif and Combs, JJ., concur.

2019 OK 32

In The Matter of the Reinstatement of Janet Bickel Hutson to Membership in the Oklahoma Bar Association, and to the Roll of Attorneys JANET BICKEL HUTSON, Petitioner, v. OKLAHOMA BAR ASSOCIATION, Respondent.

SCBD #6672. April 30, 2019

BAR REINSTATEMENT PROCEEDING

¶0 The petitioner, Janet Bickel Hutson, pled guilty to criminal charges of offering false evidence, possession of a controlled dangerous substance and perjury. She received a deferred sentence of five (5) years. Hutson resigned from the Oklahoma Bar Association pending disciplinary proceedings on July 3, 2007, following an interim suspension. The Court struck her name from the roll of Oklahoma attorneys on September 24, 2007. Hutson petitioned for reinstatement on July 25, 2018. After a reinstatement hearing, the Professional Responsibility Tribunal determined that Hutson had not established by clear and convincing evidence that she had met all of the requirements for reinstatement. Upon *de novo* review, we hold that the attorney may not be reinstated at this time. However, if she succeeds in following our proposed recommendations, she should re-apply in six months. The attorney is hereby denied reinstatement and is ordered to pay the remaining costs of $1,999.50.

REINSTATEMENT DENIED; COSTS IMPOSED.

Sheila J. Naifeh, Tulsa, Oklahoma, for Petitioner.

Tracy Pierce Nester, Assistant General Counsel, Oklahoma Bar Association, Oklahoma City, Oklahoma, for Respondent.

KAUGER, J.:

¶1 After the petitioner, Janet Bickel Hutson, (petitioner/Hutson) pled guilty to criminal charges of offering false evidence, possession of a controlled dangerous substance and perjury, the Court struck her name from the roll of attorneys on September 25, 2007. On July 25, 2018, Hutson petitioned for reinstatement. Upon a *de novo* review,[1] we hold that the petitioner did not meet the burden of proof necessary for reinstatement. Nevertheless, we propose recommendations to pursue her commitment to recovery of substance abuse and financial issues and suggest that she re-apply after at least six months of following the recommendations. She is also ordered to pay remaining costs of $1999.50.[2]

FACTS AND PROCEDURAL BACKGROUND

¶2 Hutson, a former police officer, became a member of the Oklahoma Bar Association on September 25, 1991, after graduating from law school. Her post-law school graduation work consisted primarily as an attorney in the District Attorney's office covering various counties including Muskogee, Cherokee, Wagoner, Adair, and Sequoyah. She also worked in private practice, and was appointed as a special prosecutor by the Oklahoma Attorney General in 1995 to prosecute the notorious Baby Luke case in Pittsburg County.

¶3 According to the petitioner, she suffered from anorexia off and on her entire adult life. In the early 2000's, her life began to tailspin and she started abusing cocaine. She attributed her tailspin to her traumatic childhood due to her father's alcoholism and criminal behavior, her deteriorating marriage, depression, anxiety, anorexia, her youngest son joining the military and being deployed to Iraq, and her youngest granddaughter being born with spina bifida. In 2003, she sought treatment in Arizona for anorexia, post-traumatic stress disorder, and depression, and in 2005, she took an overdose of Xanax.

¶4 The incident giving rise to her suspension occurred on February 22, 2005, when she attended a drug bust at a search scene. While at the scene, she placed a bag of methamphetamine in her purse. After the drug scene, investigators reported that drugs were missing from the crime scene, Hutson admitted that she discovered the missing drugs in her purse. She insisted that they stuck to the rubber gloves that she was wearing when she took them off and put them in her purse. She adhered to this story, testifying before the Multicounty Grand Jury on September 22, 2005.

¶5 As the investigation continued, it became apparent that the petitioner took the drugs from the scene, and altered the contents of the bag.[3] Consequently, she faced a perjury charge in Oklahoma County, and charges of offering false evidence and possession of controlled dangerous substance in Wagoner County, Oklahoma.[4] On September 8, 2006, she pled guilty to the charges, received a five (5) year deferred sentence, and paid $3500.00 in each county for a total of $7000.00 in fines and court costs.

¶6 Thereafter, the Bar Association initiated a grievance against the petitioner resulting from her guilty pleas. On March 26, 2007,[5] the Court issued an order of interim suspension, effective immediately pursuant to Rule 7.3 of the Rules Governing Disciplinary Proceedings.[6] While disciplinary proceedings were pending, the petitioner submitted a resignation on July 3, 2007, waiving any right to explain her conduct or submit mitigating evidence. She also agreed to make no application for reinstatement prior to the expiration of five years. The Court issued an order approving her resignation on September 25, 2007.

¶7 On September 14, 2011, the petitioner's criminal records were ordered expunged in both Wagoner and Oklahoma Counties. Since her resignation, Hutson has had several jobs, primarily in law offices, as a paralegal/legal assistant or an office manager. She denies having practiced law, giving legal advice, or having any clients since her resignation. She offers affidavits from several court clerks who affirm that they have not received any evidence that Hutson has practiced law since March of 2007.

¶8 In 2016, Hutson filed a Petition for Reinstatement, but voluntarily withdrew it after she became overwhelmed with the process, realized she was not ready for reinstatement, and decided that she needed independent attorney representation which she could not

afford. She submitted another Petition for Reinstatement on July 25, 2018. The Professional Responsibility Tribunal (PRT) held a reinstatement hearing on October 17th and 18th, 2018.

¶9 At the hearing, ten people testified, with sixty exhibits admitted. The first to testify (via telephone) was Penny Ross Miller, a licensed professional counselor. The counselor also provided a letter dated October 5, 2018, which verified that the petitioner began weekly therapy sessions on September 21, 2018. The letter noted that Hutson had attended three counseling sessions, and had agreed to maintain weekly sessions for the foreseeable future. The counselor's testimony expanded on the letter and identified an additional counseling session that Hutson had attended.

¶10 Another client of the counselor had recommended that Hutson seek counseling and attend AA meetings. Hutson maintains that she has remained free of illegal substances for 13 years and had recently completely abstained from alcohol. The recent counseling appears to be the only counseling the petitioner has had since her resignation in 2007. The counselor encouraged AA attendance if any type of narcotic abuse was an issue.

¶11 Next, District Judge Jeffrey Payton, attorney Brett Smith, and attorney Amy McFarland testified in support of her reinstatement regarding the many years they have known petitioner. They believe in the petitioner's moral character, legal skills and knowledge of the law, and they all supported reinstatement. Smith also sponsored the Muskogee County Bar Association's unanimous resolution of support for Hutson's reinstatement. Hutson's current employer, attorney William Connor II, also praised her current moral character and described her current work product as spectacular. Additionally, the petitioner offered seven letters from other judges and lawyers who supported her reinstatement.

¶12 Emett Hutson, the petitioner's husband, testified that he had never witnessed her using illegal drugs or abusing alcohol and that she had stopped drinking completely after agreeing to participate in Lawyers Helping Lawyers. The petitioner's son, Master Sergeant Christopher Bickel, also supported his mother, noting that she was remorseful, accepting of responsibility, and that she had high moral character. He described her as having a much better work-life balance than she did at the time she lost her license.

¶13 Clint Johnson, who served as a supervising agent District 27 Drug Task Force at the time of the incident giving rise to Hutson's resignation, gave additional details about the drug raid. He testified that the bag of methamphetamine that Hutson returned was not of the same type/quality that she took from the crime scene. He also testified that Hutson told him he should tell anyone that asked that she did not intentionally take the drugs. Ultimately, all of the drug charges against the individuals who were arrested in the raid were dropped due to the tainted evidence.

¶14 The Bar's investigator, Jamie Lane, testified regarding her investigation of the petitioner. She identified some omissions in her first petition for reinstatement such as an arrest in Arkansas in 2011 for public intoxication as well as two civil actions which had been filed against Hutson. She indicated that the two civil actions were also not disclosed in the second petition for reinstatement and that information regarding Hutson's student loan debt had not been updated since 2015. She confirmed that the petitioner had no outstanding and unpaid monetary obligations to the Bar.

¶15 Finally, the petitioner testified, recounting her employment history, education, and the events which led to her criminal prosecution. She testified that she submitted to hair follicle tests in 2005, 2007, 2009, and on September 26, 2018, at the request of the Bar, and all of those tests were negative for drugs. At the Bar's suggestion she reached out to Lawyers Helping Lawyers, and attends therapy. She has attended 17 sessions of AA, contacts her Lawyers Helping Lawyers mentor three times a week, attends a Lawyers Helping Lawyers meeting once a month, and consumes no intoxicants.

¶16 Hutson kept current on the law by reading Bar Journals since 2008 and completing 86.5 hours of continuing legal education in 2018. She accepts full responsibility for everything that has happened, but still maintains that she did not intentionally remove the drug evidence from the scene. Nevertheless, she also confirms that she was under the influence of drugs at the time the events occurred. Hutson also explained her financial situation as well as the Arkansas public citation and the two civil lawsuits she omitted in the reinstatement application.

¶17 Hutson testified that she did not intentionally omit the Arkansas public intoxication and two civil lawsuits, but that it was an oversight. She also stated that when the Bar questioned her about them, she readily admitted them. The public intoxication occurred in the summer of 2011, as a result of her being a passenger on a motorcycle driven by her intoxicated husband.

¶18 The omitted lawsuits, and additional lawsuits corroborate the petitioner's account that her life was in a tailspin beginning in the early 2000's. For example, she was involved in a medical debt collection in 2000, a foreclosure in 2002, a small claims indebtedness in 2003, a malpractice case in 2003 which was dismissed, a collection for a loan she co-signed for her son in 2004, a default loan in 2005, a small claims breach of contract in 2007, a small claims indebtedness in 2008, a tax collection in 2008, public intoxication in 2009, a medical debt collection in 2010, and two minor traffic citations in 2013 (one of which was dismissed). Nothing significant has been filed since 2010, almost a decade ago.

¶19 At the time of the hearing, the petitioner also had incurred student loan debt, tax liability to the Oklahoma Tax Commission (OTC), and to the Internal Revenue Service (IRS). She owed $7,240.87 plus penalties and interest and fees for tax years 2009 through 2014 to the OTC, $11,431.18 to the IRS, and $183,000.00 in student loans. She explained her tax liabilities were the result of a former employer's refusal to provide W-2 forms.

¶20 On December 18, 2018, the PRT filed its report and recommendation. It concluded that Hutson had not established by clear and convincing evidence that she met all of the requirements for reinstatement. The PRT unanimously recommended that Hutson not be reinstated, but that she re-apply after completing a contract with Lawyers Helping Lawyers, continuing to receive treatment by mental health professionals, attending a twelve step program and demonstrating consistent servicing of her financial obligations. The cause was assigned on January 29, 2019, and the final briefs were completed on February 20, 2019.

THE PETITIONER DID NOT MEET THE BURDEN OF PROOF NECESSARY FOR REINSTATEMENT.

¶21 The Bar Association argues that the petitioner failed to prove she met qualifications for reinstatement. The petitioner insists that she has. It is the responsibility of this Court is to gauge a lawyer's fitness to practice law, with the purpose of safeguarding the interest of the public, of the courts, and of the legal profession.[7] The nondelegable, constitutional responsibility to regulate the practice and the ethics, licensure, and discipline of legal practitioners is solely vested in this Court.[8]

¶22 We explained the rationale for this responsibility in In re Integration of State Bar of Oklahoma, 1939 OK 378, 95 P.2d 113 we noted that the regulation of the practice of law is a judicial function. An inherent power of the judiciary is to ultimately determine the qualifications of those to be admitted to practice in its courts, for assisting in its work and to protect itself in this respect from the unfit. We said:

> ¶5 There is no express grant of power in the Constitution of Oklahoma giving to any of the three departments of government the right to define and regulate the practice of law, but the very fact that the Supreme Court was created by the Constitution gives it the right to regulate the matter of who shall be admitted to practice law before the Supreme Court and inferior courts, and also gives it the right to regulate and control the practice of law within its jurisdiction.
>
> ¶6 The Supreme Court has the right to exercise all powers fundamental to its existence, and it is fundamental that it has the inherent power to regulate admission to the bar, and to control and regulate the practice of law of those admitted to the bar. . . .

¶23 In Ford v. Board of Tax-Roll Corrections, 1967 OK 90, ¶21, 431 P.2d 423 we noted that "[a]ttorneys are officers of the court and the authorities holding them to be such are legion. They are in effect an important part of the judicial system of this state. It is their duty honestly and ably to aid the courts in securing an efficient administration of justice. The practice of law is so ultimately connected and bound up with the exercise of judicial power in the administration of justice that the right to define and regulate its practice naturally and logically belongs to the judicial department of our state government." We also said:

> . . . [A]s to the respective positions of the Legislature and of the Supreme Court under the Constitution, in respect to regu-

> lating and controlling the Bar, the legislative power may enact statutes respecting the proper administration of justice and the organization of the Bar, so long as they are helpful to those ends. However, the responsibility for the due administration of justice and the regulation and control of the Bar is vested in the Supreme Court by Art. 7, § 1 , of the Constitution, and is protected against encroachment by Art. 4, § 1 , of the Constitution. It is also clear that the power to organize, regulate and control the Bar for the administration of justice is inherently vested in the Supreme Court and, in case of invasion upon this power, the Court's power is superior under the Constitution.

¶24 Without a doubt, the petitioner's conduct which gave rise to her resignation involved substance abuse and/or illegal drug use. This is not a Rule 10.11, Rules Governing Disciplinary Proceedings, 5 O.S. 2011 Ch. 1, App. 1-A, case wherein the petitioner was immediately determined to be incapable of practicing law and suspended due to that substance abuse.[9] Rather, she was immediately suspended due to her criminal charges which related to her illegal drug use.[10]

¶25 Yet, much like a Rule 10 proceeding, substance abuse is at the forefront of the discussion. Rule 10 directs that the procedures, insofar as they are applicable, for resuming the practice of law after the removal of a personal incapacity, are the same as the procedures as those provided in Rule 11,[11] following suspension upon disciplinary grounds.[12] It makes no difference whether the suspension resulted from an interim suspension for personal incapacity[13] or from a suspension pursuant to a Rule 10 proceeding where no interim suspension was sought.[14]

¶26 In requesting reinstatement, the lawyer must establish by clear and convincing evidence that: 1) the condition is no longer a threat rendering the applicant personally incapable of practicing law; and 2) the applicant's conduct will conform to the high standards required of a member of the Oklahoma Bar. Further, the applicant must present stronger proof of qualifications than one seeking admission for the first time.[15] Much like a Rule 10 proceeding, one of our objectives when considering reinstatement is to minimize any potential risk of harm to the public. In that vein, the focus is not exclusively on the past; rather the focus is on the practitioner's present condition and its future consequences.[16]

¶27 A practitioner's incapacity, whether past or present, is important in crafting solutions which accord with the law's imperative of ensuring protection of the public from substandard lawyers.[17] One case particularly insightful to this cause is State ex. rel. Okla. Bar Ass'n. v. Albert, 2007 OK 31, 163 P.3d 527. In Albert, the attorney agreed to an interim suspension and admitted that he was incapable of practicing law. We suspended the attorney until further order of the Court.

¶28 The suspended attorney sought inpatient treatment for almost one month for both alcohol and cocaine addictions. The attorney's prognosis on discharge was "guarded to fair." He agreed to random drug tests and had submitted two tests both of which were negative. The attorney completed a six-week relapse prevention program, and attended Alcoholics Anonymous and participated in Lawyers Helping Lawyers. At the time of the first reinstatement hearing, only seven weeks had passed since the attorney was released from treatment, and only thirteen and a half weeks had passed by the time the attorney filed the petition for reinstatement.

¶29 To support reinstatement, the attorney presented testimony from a trial judge, a defense lawyer, a drug counselor, and a friend from a treatment center all of whom agreed that the attorney needed safeguards in place such as counseling, monitoring, random urinalysis, attendance at counseling and Lawyers Helping Lawyers to be able to cope and function in daily life. The Bar Association also spoke to the same effect on the attorney's behalf. It was undisputed that prior to affliction, the attorney was an excellent attorney and asset to the Bar. The attorney's own clear and convincing evidence showed that the attorney remained incapable of practicing law without assistance.

¶30 Furthermore, the attorney's conduct had adversely affected the legal matters of several clients, tarnished the image of the legal profession, and fostered and promoted a destructive lifestyle. Given the severity of the afflictions, the severity of the misconduct, the surrounding circumstances, and the particularly short time frame in which this cause was brought seeking reinstatement, we were not convinced that the attorney had met the burden placed upon him by the Rules Governing Disciplinary Proceedings and the precedents set by this Court in regard to those rules.

¶31 The Bar Association had recommended reinstatement with certain conditions imposed.[18] We did not follow the Bar Association's recommendation because our research did not reflect any precedent for such a recommendation. Instead, our previous cases were contra – particularly when one considered the detriment to the clients, the seriousness of the conduct, the extent of addiction, and, in particular, the length of time in which the attorney sought help in controlling the addiction.[19]

¶32 We noted that we look at several criteria for reinstatement when a lawyer has been either disbarred or has resigned pending disciplinary proceedings while holding to our primary duty of safeguarding the public, the courts, and the legal profession.[20] The factors include: present moral fitness; consciousness of the wrongfulness; disrepute brought on the profession; extent of rehabilitation; seriousness of the original misconduct; conduct subsequent to discipline; time elapsed since the original discipline; petitioner's character, maturity, and experience; and present competence in legal skills.[21] While all the factors are relevant when the suspension results from an incapacity to practice law, those weighing most heavily to the incapacity are: 1) the extent of rehabilitation of the affliction attributable to the incapacity; 2) the conduct subsequent to the suspension and treatment received for the condition; and 3) the time which has elapsed since the suspension.

¶33 We remanded that cause to the PRT to afford the attorney to show that: 1) the attorney was no longer threatened by the condition which rendered the attorney personally incapable of practicing law; 2) the attorney's conduct would conform to the high standards required of a member of the Oklahoma Bar; and 3) the attorney presented stronger proof of qualifications than one seeking admission for the first time. We said that to be reinstated, the attorney must make a showing that over a significant amount of time, he maintained sobriety and refrained from abusing drugs or alcohol; passed random drug tests; attended Alcoholics Anonymous meetings; sought necessary counseling; and participated in Lawyers Helping Lawyers; diligently pursued sobriety; and met the other factors necessary for reinstatement.

¶34 Today, we follow Albert, supra. Caselaw since Albert involving attorneys engaged in similar behavior to the petitioner has resulted in reinstatement being granted,[22] and, in some cases, denied.[23] Furthermore, other cases in which drugs or alcohol were not involved, but in which the conduct was as serious as the petitioner's misconduct have also resulted in reinstatement,[24] with a few exceptions.[25] Here, more than a decade has passed before seeking reinstatement. However, given the severity of her afflictions, and her misconduct, the surrounding circumstances, and the fact that a criminal case was affected by her behavior, we are not convinced that she met the burden placed upon her by the Rules Governing Disciplinary Proceedings and the precedents set by this Court in regard to those rules at this time.

¶35 Although she had begun counseling, she had only attended three sessions at the time of her application for reinstatement. We recommend that she reapply for reinstatement in six months after doing the following: 1) maintain sobriety, and refrain from abusing prescribed medications or illegal drugs; 2) submit to random drug testing and pass; 3) abide by her Lawyers Helping Lawyers Contract, continue counseling, and have her counselor submit monthly progress reports of her continued care and treatment; 4) follow her counselor's recommendations regarding attendance of Twelve Step Program meetings; and 5) continue to make regular payments to her tax and student loan obligations.

CONCLUSION

¶36 The petition for reinstatement of Janet Bickel Hutson is denied. On application of the Oklahoma Bar Association, costs of $1,999.50 are assessed against her. The application to assess costs is unopposed, and the petitioner has not requested any type of payment accommodation. Consequently, the costs are to be paid by order of this Court within ninety (90) days after this opinion is issued.

REINSTATEMENT DENIED; COSTS IMPOSED.

GURICH, C.J., KAUGER, WINCHESTER, EDMONDSON, REIF, JJ., concur.

COLBERT, J., concurs specially.

COLBERT, J., concurring specially:

I would admit her at the present time.

DARBY, V.C.J., and COMBS, J., concur in part and dissent in part.

KAUGER, J.:

1. State ex rel. Oklahoma Bar Ass'n v. Phillips, 2002 OK 86, ¶2, 60 P.3d 1030; State ex rel. Oklahoma Bar Ass'n v. Erickson, 2001 OK 66, ¶14, 29 P.3d 550; State ex rel. Oklahoma Bar Ass'n v. Israel, 2001 OK 42, ¶13, 25 P.3d 909; State ex rel. Oklahoma Bar Ass'n v. Smolen, 2000 OK 95, ¶7, 17 P.3d 456.

2. On March 29, 2019, the petitioner filed an affidavit of payment of costs, verifying that she had paid the court reporter in full and some $492.38 in miscellaneous costs requested by the Bar Association, leaving only $1999.50 remaining for the Multicounty Grand Jury Transcripts. Rule 6.13, Rules Governing Disciplinary Proceedings, 5 O.S. 2011, Ch.1, App. 1-A provides in pertinent part:

> Within thirty (30) days after the conclusion of the hearing, the Trial Panel shall file with the Clerk of the Supreme Court a written report which shall contain the Trial Panel's findings of fact on all pertinent issues and conclusions of law (including a recommendation as to discipline, if such is found to be indicated, and a recommendations as to whether the costs of the investigation, record and proceedings should be imposed on the respondent) …

Rule 6.16, Rules Governing Disciplinary Proceedings, 5 O.S. 2011 Ch. 1, App. 1-A provides in pertinent part:

> The costs of investigation, the record, and disciplinary proceedings shall be advanced by the Oklahoma Bar Association (or the Professional Responsibility Commission, if provision therefore has been made in its budget). Where discipline results, the cost of the investigation, the record, and disciplinary proceedings shall be surcharged against the disciplined lawyer unless remitted in whole or in part by the Supreme Court for good cause shown. . .

3. According to the petitioner, she began to pour the drugs into the toilet before she decided to return the baggy. According to the investigators, the missing drugs were replaced with a lower quality drug.

4. On January 30, 2006, the Multicounty Grand Jury issued an indictment against the petitioner for perjury because she testified that she had never purchased, received or otherwise obtained illegal controlled dangerous substances for her own personal use. It was alleged that multiple deliveries of drugs were made to the petitioner at the Muskogee County Courthouse while serving as a District Attorney, at her private law office while in private practice, and at the Cherokee County Courthouse while serving as a District Attorney. The Multicounty Grand Jury issued another indictment on January 31, 2006, against the petitioner for possession of controlled dangerous substance and another indictment on March 29, 2006, for offering false evidence and possession of controlled dangerous substance.

5. The order is dated March 26, 2007. It was filed on the Office of Chief Justice Bar Docket the same day and filed in the Supreme Court Bar Docket on March 27, 2007.

6. Rule 7.3, Rules Governing Disciplinary Proceedings, 5 O.S. Supp. 2007 Ch. 1, App. 1-A provides:

> Upon receipt of the certified copies of Judgment and Sentence on a plea of guilty, order deferring judgment and sentence, indictment or information and the judgment and sentence, the Supreme Court may by order immediately suspend the lawyer from the practice of law until further order of the Court. In an order of suspension the Court may direct the lawyer to file a statement, to show cause, if any the lawyer has, why the order of suspension should be set aside. Upon good cause shown, the Court may set aside its order of suspension when it appears to be in the interest of justice to do so, due regard being had to maintaining the integrity of and confidence in the profession. . . .

7. State ex rel. Oklahoma Bar Ass'n v. Bolton, 1995 OK 98, ¶15, 904 P.2d 597; State ex rel. Oklahoma Bar Ass'n v. Donnelly, 1992 OK 164, ¶14, 848 P.2d 543; State ex rel. Oklahoma Bar Ass'n v. Colston, 1989 OK 74, ¶20, 777 P.2d 920; State ex rel. Oklahoma Bar Ass'n v. Moss, 1983 OK 104, ¶12, 682 P.2d 205.

8. State ex rel. Oklahoma Bar Ass'n v. Holden, 1995 OK 25, ¶1, 895 P.2d 707; State ex rel. Farrant, 1994 OK 13, ¶8, 867 P.2d 1279; Tweedy v. Oklahoma Bar Ass'n, 1981 OK 12, ¶4, 624 P.2d 1049.

9. Rule 10 *et seq.* Rules Governing Disciplinary Proceedings, 5 O.S. 2011 Ch. 1, App. 1-A. Rule 10.5, Rules Governing Disciplinary Proceedings, 5 O.S. 2011 Ch. 1, App. 1-A, provides:

> Whenever a proceeding charging that a lawyer is personally incapable of practicing law is based upon conduct or neglect of duty in respect to the affairs of any client, the complaint must also allege specifically any such conduct which would justify the imposition of discipline, so that the Professional Responsibility Tribunal may hear evidence thereon, and in its report shall make findings and a recommendation as to whether the lawyer should be disciplined or whether he should be found personally incapable of practicing.

1 Ch. 1, App. 1-A, provides:

> The report of the Trial Panel of the Professional Responsibility Tribunal shall be made to the Chief Justice for proceedings in the Supreme Court as in disciplinary actions. If the Court finds the respondent personally incapable of practicing law, he shall be formally suspended from the practice of law until the further order of the Court.

10. Rule 7.3, Rules Governing Disciplinary Proceedings, 5 O.S. Supp. 2007 Ch. 1, App. 1-A, see note 6, supra.

11. Rule 11 *et seq.*, Rules Governing Disciplinary Proceedings, 5 O.S. 2011 Ch. 1, App. 1-A, governs the reinstatement process.

12. Rule 10.11, Rules Governing Disciplinary Proceedings, 5 O.S. 2011 Ch. 1, App. 1-A, provides in pertinent part:

> (a) Procedures for reinstatement of a lawyer suspended because of personal incapacity to practice law shall be, insofar as applicable, the same as the procedures for reinstatement provided in Rule 11 following the suspension following disciplinary grounds. . . .

13. Rule 6.2A, Rules Governing Disciplinary Proceedings, 5 O.S. 2101 Ch. 1, App. 1-A.

14. Rule 10.5, Rules Governing Disciplinary Proceedings, 5 O.S. 2011 Ch. 1, App. 1-A, see note 9, supra.

15. Rule 11.4 Rules Governing Disciplinary Proceedings, 5 O.S. 2011 Ch. 1, App. 1-A, provides:

> An application for reinstatement must establish affirmatively that, if readmitted or if the suspension from practice is removed, the applicant's conduct will conform to the high standards required of a member of the Bar. The severity of the original offense and the circumstances surrounding it shall be considered in evaluating an application for reinstatement. The burden of proof, by clear and convincing evidence, in all such reinstatement proceedings shall be on the applicant. An applicant seeking such reinstatement will be required to present stronger proof of qualifications than one seeking admission for the first time. The proof presented must be sufficient to overcome the Supreme Court's former judgment adverse to the applicant. Feelings of sympathy toward the applicant must be disregarded. If applicable, restitution, or the lack thereof, by the applicant to an injured party will be taken into consideration by the Trial Panel on an application for reinstatement. Further, if applicable, the Trial Panel shall satisfy itself that the applicant complied with Rule 9.1 of these Rules.

16. State ex rel. Oklahoma Bar Ass'n v. Adams, 1995 OK 17, ¶13, 895 P.2d 701.

17. State ex rel. Oklahoma Bar Ass'n v. Carpenter, 1993 OK 86, ¶11, 863 P.2d 1123.

18. The conditions or "stipulations" as they were referred to at the time were that the attorney: 1) maintain sobriety, and refrain from abusing prescribed medications or using any prescription medications without a doctor's written authorization; 2) submit to random drug testing and pass; 3) abide by the Lawyers Helping Lawyer's Contract and have a mentor, alcoholic anonymous sponsor, and counselor submit monthly progress reports of continued care and treatment; 4) attend alcoholic anonymous meetings; 5) follow the Bar Association's recommendations regarding law office practice and management; 6) enroll and attend counseling, treatment courses, or facilities as may be recommended; 7) diligently, competently, timely and professionally handle clients' cases and earn any fee for which was paid in advance; and 8) comply with all of the terms and conditions of probation or face immediate suspension or discipline.

19. In some cases, a practitioner incapable of practicing law and engaged in neglectful conduct similar to Albert was suspended for two years and a day. For example, In State ex rel. Oklahoma Bar Association v. Adams, 1995 OK 17, ¶25, 895 P.2d 701, a practitioner whom the Court found incapable of practicing law under Rule 10 due to alcoholism was suspended for two years and a day for conduct charged in five grievances such as failure to prosecute a cross-petition, file response to summary judgment, and keep clients informed of case. Practitioner failed to appear in court, file timely pleadings and to show up prepared and with proper regard for personal appearance and hygiene.

Some cases involve suspension under Rule 10 which was later reinstated. In the Matter of Reinstatement of Rhoads, 2005 OK 53, 116 P.3d 187(Attorney who was suspended from the practice of law under Rule 10 in 1999 for mental illness was denied reinstatement in 2000 when his doctor testified that he was fit to practice law if he stayed on medication, continued to monitor blood levels and attended therapy. However, he was eventually reinstated in 2005 when he was able to prove by clear and convincing evidence that reinstatement was warranted.).

In other discipline or reinstatement cases Rule 10 was not involved, but drug or alcohol abuse was a part of the practitioner's lifestyle. In In the Matter of Reinstatement of Kenneth Van Todd, SCBD No. 5130, (The Court denied reinstatement to an attorney who pled guilty to six felonies stemming from a drug addiction and the explosion of his meth lab even though he had successfully completed

7 ½ years of probation.); In State ex rel. Oklahoma Bar Ass'n v. Beasley, 2006 OK 49, ¶49, 142 P.3d 419 (Alcoholic practitioner with 6 grievances involving failure to perform legal services, failure to communicate with clients and failure to refund unearned fees was suspended for two years and a day.); In State ex rel. Oklahoma Bar Ass'n v. Rogers, 2006 OK 54, ¶22, 142 P.3d 428, the Court recently suspended a practitioner for two years and a day for professional misconduct arising out of numerous alcohol-related felony and misdemeanor convictions. In the Matter of Reinstatement of Tully, 2004 OK 44, ¶11, 92 P.3d 693 (Attorney who was suspended in 2001 for two years and a day for misappropriating funds and pled no contest for felonious possession with intent to distribute a controlled dangerous substance and the possession of a firearm during a felony was reinstated in 2004 after the attorney demonstrated that he had reformed his lifestyle and had demonstrated a commitment to programs to assist him in overcoming his previous drug addition.); In re Reinstatement of Peveto, 2004 OK 95, ¶13, 105 P.3d 829 (Attorney who had maintained sobriety for over a decade and had not used drugs since disbarment denied reinstatement because he did not fully satisfy the civil judgments entered against him.); State ex rel. Oklahoma Bar Ass'n v. Giger, 2001 OK 96, ¶25, 37 P.3d 856 (Practitioner had six arrests for drug related vehicular crimes and failure to competently, diligently represent clients, and failure to respond to disciplinary inquiries State ex rel. Oklahoma Bar Association, v. Tully, 2000 OK 93, ¶24, 20 P.3d 813 (Practitioner who admitted use of methamphetamine and who misappropriated funds, and had felony and misdemeanor convictions was suspended for two years and a day.). In the Matter of Reinstatement of Dennison, 1996 OK 24, ¶16, 913 P.2d 1315 (Attorney suspended in 1992 after pleading *nolo contendere* to two counts of making a false statement to a federally insured financial institution reinstated in 1996 after showing sobriety, regular attendance of alcoholics anonymous, working with Lawyers Helping Lawyers.) In the Matter of Reinstatement of Pierce, 1996 OK 65, ¶17, 919 P.2d 422 (Criminal defense attorney who resigned in 1989 with four counts of professional misconduct against him and an arrest and charges resulting from thirteen drug-related counts was denied reinstatement in 1996 because he couldn't prove rehabilitation, good moral character, and that he timely notified clients that he could not represent them.); State ex rel. Oklahoma Bar Ass'n v. Briery, 1996 OK 46, ¶15, 914 P.2d 1046 (Practitioner suspended two years and a day for failing to appear in court, failing to notify clients, and improper use of funds, and writing insufficient checks. By the time discipline was imposed, the practitioner had undergone treatment and had remained sober for a substantial period of time.); In the Matter of Reinstatement of Wright, 1995 OK 128, ¶22, 907 P.2d 1060 (Practitioner reinstated in 1995 after suspension upon felony conviction for distributing cocaine in 1988 because he was not a trafficker or dealer, and no evidence that his use of illegal substances affected his representation of clients. He also underwent regular drug testing for 68 months from 1987 to 1992 with no positive results for any illegal drugs.); State ex rel. Oklahoma Bar Ass'n v. Willis, 1993 OK 138, ¶16, 862 P.2d 1211 (Practitioner convicted of obtaining controlled substance by misrepresentation warranted suspension for 15 months.); State ex rel. Oklahoma Bar Ass'n v. Wright, 1990 OK 45, ¶2, 792 P.2d 1171 (Attorney who pled guilty to one count of distributing cocaine to friends in a social setting was suspended from the practice of law for two years and one day.); State ex rel. Oklahoma Bar Ass'n v. Hall, 1989 OK 119, ¶37, 781 P.2d 821(One year suspension for neglect of legal matter and making false statements for attorney who treated depression with alcohol but stopped drinking for eighteen months.); State ex rel. Oklahoma Bar Ass'n v. Thompson, 1989 OK 123, ¶13, 781 P.2d 824 (Nine month suspension for attorney convicted for possession of marijuana.); In the Matter of Reinstatement of Kamins, 1988 OK 32, ¶24, 752 P.2d 1125 (Alcoholic attorney who resigned in 1982 pending six formal grievances relating to commingling funds was denied reinstatement in 1998 despite his recovery for failure to meet burden of proof in part because he failed to accept the blame for his actions and his alcoholism and failed to make restitution.); State ex rel. Oklahoma Bar Ass'n v. Ingmire, 56 O.B.J. 2082 (1985) (Practitioner who was convicted of a misdemeanor for simple possession of cocaine was suspended for three years.).

In State ex rel Oklahoma Bar Ass'n v. Armstrong, 1992 OK 79, ¶1, 848 P.2d 538, we declined to impose discipline for a practitioner who was convicted of a second offense of driving under the influence because, following the incident, he had not taken a drink in over six years, had undergone extensive rehabilitation, and had been a model of rehabilitation to others.

In some cases, where the client neglect was either minimal or nonexistent or the attorney failed to cooperate with the disciplinary proceedings the Court has issued discipline for less than six months or public censures. State ex rel Oklahoma Bar Ass'n v. Burns, 2006 OK 75, ¶35, 145 P.3d 1088 (Six month suspension for driving while intoxicated or under influence of alcohol.); State ex rel Oklahoma Bar Ass'n v. Aston, 2003 OK 101, ¶21, 81 P.3d 676 (Six month suspension for possession of marijuana.); State ex rel Oklahoma Bar Ass'n v. Hogue, 1995 OK 64, ¶2, 898 P.2d 153 (Six month suspension for false statement after denying use of drugs and failing drug test and pleading guilty to driving under influence and transporting open container.); State ex rel Oklahoma Bar Ass'n v. Carpenter, 1993 OK 86, ¶19, 863 P.2d 1123 (Six month suspension for attorney with alcohol problems with counts of lending money to clients and commingling funds, failure to keep proper records and failure to deliver funds promptly.); State ex rel Oklahoma Bar Ass'n v. Perkins, 1992 OK 7, ¶9, 827 P.2d 168 (Six month suspension for attorney who had been attending treatment for substance abuse for 5 years and who failed to return calls and failed to file estate tax return while handling probate.); State ex rel Oklahoma Bar Ass'n v. Thompson, 1993 OK 144, ¶15, 864 P.2d 339 (90 day suspension for alcoholic attorney who neglected case and misrepresented facts of grievance.); State ex rel Oklahoma Bar Ass'n v. Arnett, 1991 OK 44, ¶10, 815 P.2d 170 (90 day suspension for attorney charged with possession of controlled substance.); State ex rel Oklahoma Bar Ass'n v. Garrett, 2005 OK 91, ¶30, 127 P.3d 600 (Public censure for alcoholic attorney who was arrested for sexual battery.); State ex rel Oklahoma Bar Ass'n v. Farber, 1993 OK 129, ¶1, 863 P.2d 1175 (Public censure for alcoholic who failed to promptly deliver funds, represent diligently, and keep client informed.); State ex rel Oklahoma Bar Ass'n v. Donnelly, 1992 OK 164, ¶22, 848 P.2d 543 (Public censure for alcoholic who lacked diligence, promptness and not keeping client informed.); State ex rel Oklahoma Bar Ass'n v. Blackburn, 1991 OK 35, ¶9, 812 P.2d 379 (Public censure for failure to file criminal brief and a conflict of interest in a divorce proceeding for attorney under substance abuse.); State ex rel Oklahoma Bar Ass'n v. Garvin, 1989 OK 97, ¶19, 777 P.2d 926 (Public censure for alcoholic who failed to file lawsuit and kept retainer, failed to inform client, and failed to respond to investigation.).

20. In the Matter of Reinstatement of Fraley, 2005 OK 39, ¶35, 115 P.3d 842; In the Matter of Reinstatement of Pierce, 1996 OK 65, ¶16, 919 P.2d 422; In the Matter of Reinstatement of Cantrell, 1989 OK 165, ¶2, 785 P.2d 312; State ex rel. Oklahoma Bar Ass'n v. Raskin, 1982 OK 39, ¶15, 642 P.2d 262.

21. In the Matter of Reinstatement of Rhoads, 2005 OK 53, ¶3, 116 P.3d 187; In the Matter of Reinstatement of Gassaway, 2002 OK 48, ¶3, 48 P.3d 805; In the Matter of Reinstatement of Kamins, 1988 OK 32, ¶20, 752 P.2d 1125.

22. In re McLaughlin, 2018 OK 41, ¶21, 419 P.3d 239 (Alcoholic attorney charged in sixteen separate criminal cases, a majority of which were related to alcohol abuse was reinstated eleven years after suspension.); In re Blake, 2016 OK 33, ¶23, 371 P.3d 465 (Attorney charged with felony count of trafficking illegal drugs [methamphetamine] reinstated eight years after suspension and recovery.); In re Reinstatement of Pate, 2008 OK 24, ¶27, 184 P.3d 528 (Attorney impaired by drugs and alcohol committed serious crimes reinstated 9 years after suspension and recovery.); In re Johnston, 2007 OK 46, ¶36, 162 P.3d, 544 (Attorney who resigned following drug related federal criminal charges reinstated seven years later.).

23. In re Reinstatement of Tunell, 2018 OK 82, ¶10, ___ P.3d ___ (Attorney who failed to show his serious problems with alcoholism, depression and anxiety had been properly treated denied reinstatement.).

24. In re Reinstatement of Clayborne, 2017 Ok 93, ¶5, 406 P.3d 578 (Reinstatement of attorney who was disbarred based on conviction for subornation of perjury reinstated six years after suspension.); In re Reinstatement of Dobbs, 2001 OK 32, ¶19, 256 P.3d 52 (Attorney suspended for inducing secretary to falsely notarize an affidavit, lying under oath and concealing information reinstated seven years after suspension.); In re Reinstatement of Steward, 2010 OK 61, ¶7, 240 P.3d 666 (Attorney suspended for four years for tax liability reinstated.); In re Reinstatement of Jones, 2009 OK 1, ¶23, 203 P.3d 909 (Attorney discovered taking money from a guardianship account reinstated after nine years after resignation.); In re Reinstatement of Spilman, 2004 OK 79, ¶24, 104 P.3d 576 (Attorney convicted for bribery of a State's witness reinstated nine years after resignation.); In re Reinstatement of Cantrell, 1989 OK 165, ¶10, 785 P.2d 312 (Attorney convicted of attempted perjury by subornation reinstated two years after disbarment.).

25. In re Reinstatement of Hird, 2008 OK 25, ¶13, 184 P.3d 535 (Attorney who pled guilty to bank fraud and money laundering denied reinstatement sixteen years after resignation.); In re Anderson, 2002 OK 84, ¶28, 51 P.3d 581 (District Attorney engaged in embezzlement denied reinstatement six years after resignation.); In re Hardin, 1996 Ok 115, ¶12, 927 P.2d 545 (Attorney who failed to file income tax returns for five years and still owed taxes denied reinstatement six years after resignation.); In re Reinstatement of Brown, 1996 OK 95, ¶20, 925 P.2d 44 (Attorney who resigned after embezzlement and forgery denied reinstatement six years after resignation.); In re Reinstatement of Smith, 65 O.B.A.J. 532 (Attorney indicted and convicted of 17 felonies denied reinstatement two years after resignation.).

2019 OK 33

OKLAHOMA COALITION FOR REPRODUCTIVE JUSTICE, on behalf of itself and its members; and NOVA HEALTH SYSTEMS, d/b/a REPRODUCTIVE SERVICES, on behalf of itself, its staff, and its patients, Plaintiffs/Appellees, v. TERRY L. CLINE in his official capacity as OKLAHOMA COMMISSIONER OF HEALTH, Defendant, and LYLE KELSEY, in his official capacity as EXECUTIVE DIRECTOR OF THE OKLAHOMA STATE BOARD OF MEDICAL LICENSURE AND SUPERVISION, Defendant/Appellant, and PRESTON L. DOERFLINGER, in his official capacity as OKLAHOMA INTERIM COMMISSIONER OF HEALTH, Appellant.

No. 116,603. April 30, 2019

ON APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY

The Honorable Patricia G. Parrish, Trial Judge

¶0 After we reviewed plaintiff's two Oklahoma constitutional challenges to House Bill 2684, we remanded the cause to the district court to consider the plaintiff's remaining challenges to the bill. The district court found H.B. 2684 to be unconstitutional, and the State appealed. We retained the appeal for disposition. On June 4, 2018, we stayed resolution of this cause pending the outcome of an Arkansas case which involved a similar statute. The Arkansas case concluded with a dismissal by the appealing parties, thus rendering it ineffective precedent to apply to this cause. We hereby vacate our stay and hold that: 1) decisions from the United States Supreme Court are binding on this Court and where the United States Supreme Court has spoken, this Court is bound by its pronouncements; and 2) the Legislature's requirement that physicians adhere to the Federal Drug Administration's (FDA) 2000 label protocol for medication terminated pregnancies, rather than the more effective current 2016 label protocol, places a substantial obstacle in the path of a woman's choice and imposes an undue burden on the woman's rights pursuant to United States Supreme Court precedent as it currently exists.

STAY LIFTED; TRIAL COURT AFFIRMED.

Mithun S. Mansinghani, Solicitor General, Michael K. Velchik, Assistant Solicitor General, State of Oklahoma, Oklahoma City, Oklahoma, for Defendants/Appellants.

J. Blake Patton, Oklahoma City, Oklahoma, for Plaintiffs/Appellees.

PER CURIAM:

¶1 We decided Oklahoma Coalition for Reproductive Justice v. Cline, 2016 OK 17, 368 P.3d 1278 (Cline III) on February 23, 2016, which addressed whether House Bill (H.B.) 2684 violated two provisions of the Oklahoma Constitution. The provisions in question were art. 5, §1, delegation of legislative authority[1] and art. 5, §59 prohibition of special laws.[2] We held that neither provision was violated, and we remanded the cause to the trial court for a determination of the bill's validity under other state and federal constitutional provisions. The trial court held a hearing on October 6, 2017, and on November 9, 2017, it granted summary judgment and declared H.B. 2684 "unconstitutional in all applications" and "therefore void and of no effect." The State appealed on December 8, 2017, and we retained the cause on January 2, 2018.

¶2 On June 4, 2018, we stayed resolution of this cause pending the outcome of an Arkansas case, Planned Parenthood Arkansas & Eastern Oklahoma v. Jegley, 2016 WL 6211310 (E.D. Ark. 2016), which involved a similar statute. The Arkansas case concluded with a dismissal by the appealing parties, thus rendering it ineffective to persuasively apply to this cause.[3] We hereby vacate the stay and hold that: 1) decisions from the United States Supreme Court are binding on this Court, and because the United States Supreme Court has spoken, this Court is bound by its pronouncements;[4] and 2) the Legislature's requirement that physicians adhere to the Federal Drug Administration's (FDA) 2000 label protocol for medication-induced abortions, rather than the more effective current 2016 label protocol places a substantial obstacle in the path of a woman's choice and imposes an undue burden on the woman's rights pursuant to United States Supreme Court precedent as it currently exists.

FACTS AND PROCEDURAL HISTORY

¶3 The undisputed facts in this appeal which are supported by competent evidentiary materials which are nearly identical to those in Cline

III, supra, ¶¶9-11, and are summarized here. Cline III, supra, also discussed the procedural history of both the caselaw and legislation leading up to the enactment of H.B. 2684 in ¶¶2-7. (We summarize that history here as well as previously stated in Cline III, supra.)

¶4 Medication terminated pregnancy is a procedure for terminating a pregnancy using medications alone, generally following a protocol using both Mifeprex and misoprostol, which are taken one after the other respectively. Methotrexate is used to terminate or treat ectopic pregnancies. In 2011, the Oklahoma Legislature enacted H.B. 2684's predecessor, H.B. 1970, ch. 216, 2011 Okla. Sess. Laws 821-23 (codified at 63 O.S.Supp. 2011, § 1-729a), which prohibited the off-label use of Mifeprex (generally known as mifepristone or RU-486) and misoprostol (brand name Cytotec) for use in treatment. The effect of H.B. 1970 was to ban medication terminated pregnancies in Oklahoma.[5]

¶5 In the first challenge to H.B. 1970, this Court followed Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992), and affirmed the district court's decision that H.B. 1970 was unconstitutional.[6] The appellees filed a petition for certiorari in the United States Supreme Court.[7] The U.S. Supreme Court granted the petition and certified two questions to this Court: whether H.B. 1970 prohibits "(1) the use of misoprostol to induce abortions, including the use of misoprostol in conjunction with mifepristone according to a protocol approved by the Food and Drug Administration; and (2) the use of methotrexate to treat ectopic pregnancies."[8]

¶6 In our second pronouncement, we answered both questions affirmatively and the United States Supreme Court then dismissed the petition for certiorari as improvidently granted, leaving our decision intact.[9] In 2014, in response to our second decision, the Legislature passed H.B. 2684, amending Title 63, Section 1-729a of the Oklahoma Statutes. H.B. 2684, ch. 121, 2014 Okla. Sess. Laws 375-80. H.B. 2684 was approved by the Governor and became effective on November 1, 2014.

¶7 In 2000, based on previously conducted clinical trials, the FDA approved Mifeprex's final printed label (FPL) protocol for marketing and distribution by the manufacturer. The approved use is for up to the first 49 days of gestation as measured from the first day after a woman's last menstrual period[10] and it requires:

(1) Mifeprex distribution only to doctors who have read and understand the prescribing information.

(2) Three office visits for patients.

(3) Administration of Mifeprex only in a clinic, medical office, or hospital, by or under the supervision of a physician able to assess the gestational age of an embryo and to diagnose ectopic pregnancies.

(4) Patients to read the medication guide and read and sign the patient agreement before treatment.

(5) Administration of one dose of 600 milligrams(mg) of Mifeprex.

(6) Oral administration of 400 micrograms (g) of misoprostol given two days later unless an abortion has been confirmed.

(7) A follow-up visit about fourteen days after the administration of the Mifeprex to confirm complete termination of the pregnancy.

(8) Warning to patients that some women may experience vaginal bleeding or spotting up to sixteen days.

(9) Warning to patients that heavy or moderate bleeding is an indication of an incomplete termination.

It is uncontested that the FDA's requirements apply to the manufacturer and are marketing restrictions and other special distribution conditions, but the requirements do not restrict or control a doctor's practice of medicine or the use of medication once it is distributed.

¶8 Within a year of the FDA's approval of Mifeprex in 2000, ninety-six percent of medically terminated pregnancies did not follow the FPL protocol used in the clinical trials on which the FPL's approval was based.[11] The American College of Obstetricians and Gynecologists (ACOG) materials state that the off-label protocol actually used by most doctors is more effective with fewer adverse effects.

¶9 Plaintiff Nova Health Services (plaintiff/Nova) followed an off-label protocol which is endorsed by the ACOG. The ACOG recommended off-label, or "evidence-based," protocol is based on "good and consistent scientific evidence" and includes vaginal, buccal,

and sublingual administration of misoprostol by the patient away from a clinic. The ACOG off-label protocol provides for administration of one 200 milligram dose of Mifeprex, compared to the 600 milligrams of FDA on-label protocol, followed by 800 micrograms of misoprostol to be patient self-administered, compared to FDA's protocol of 400 milligrams to be doctor administered. The ACOG materials provide that medication terminationss can be provided safely through nonphysician clinicians and that the protocol can be used for up to 63 days of gestation (calculated from the last menstrual period). ¶10 H.B. 2684 restricts Mifeprex and misoprostol use for treatment to the FDA-approved final Mifeprex label, prohibits methotrexate use for treatment except to treat ectopic pregnancies, provides for liability of physicians who knowingly or recklessly perform a termination in violation of H.B. 2684, and makes doctors subject to discipline and actual and punitive damages for violating H.B. 2684. Title 63 O.S. § 1-729a(C)-(H). Because the Mifeprex label only allows its use for 49 days after the last menstrual period and Mifeprex off-label use allows for its use up to 63 days, the effect of H.B. 2684 is to ban the use of the Mifeprex and misoprostol drugs for pregnancies between 49 and 63 days from the last menstrual period.

¶11 On September 30, 2014, the Oklahoma Coalition for Reproductive Justice and Nova filed a challenge to H.B. 2684's prohibition of the off-label use of Mifeprex in the district court against the Oklahoma Commissioner of Health and the Executive Director of the Oklahoma State Board of Medical Licensure and Supervision (State). Nova challenged H.B. 2684 as violating rights guaranteed by the Oklahoma Constitution, including the right to due process by limiting women's rights to choose to terminate a pregnancy, to bodily integrity, and to equal protection; violating the Oklahoma constitutional prohibition against special laws; and improperly delegating legislative authority.

¶12 The district court rendered summary judgment in favor of the plaintiffs, finding that H.B. 2684 is a special law in violation of art. 5, §59 of the Oklahoma Constitution.[12] The State appealed, raising only the questions of issue preclusion, unauthorized delegation of legislative authority, and special law. We retained the appeal for disposition and decided Oklahoma Coalition for Reproductive Justice v. Cline, 2016 OK 17, 368 P.3d 1278 (Cline III) on February 23, 2016, in which we reversed the district court and remanded for disposition of plaintiff's remaining challenges.

¶13 After our opinion in Cline III, supra, was decided, the FDA approved a new FPL protocol for Mifeprex on March 29, 2016. However, in Cline III, supra, we upheld H.B. 2684's constitutionality under the improper delegation of legislative authority challenge because the bill did not allow the FDA to change Oklahoma termination laws by changing protocols. Thus, H.B. 2684 was upheld as constitutional in Cline III, supra, because physicians were required to adhere to the label protocol at the time H.B. 2684's enactment (the FDA 2000 protocol) and not any new or revised protocols which might be adopted by the FDA.[13] According to the plaintiffs, this adherence under H.B. 2684 makes Oklahoma the only state in the nation to mandate that physicians adhere to an obsolete drug regimen that has been universally rejected by practitioners, medical experts, professional organizations, and the FDA.[14] The relevant regimen under the current 2016 FPL protocol is similar to what Nova followed and what the ACOG recommended as an off-label, "evidence-based" protocol prior to the FDA's 2016 change. It provides:

1. Usage approved through 70 days of gestation (an increase from 49 days).
2. Dosage of Mifeprex 200 mg orally on day 1 in a single dose (decreased from 600 mg).
3. Dosage of Misoprostol 800 mcg bucally, 24 to 48 hours after Mifeprex (from 400 mcg orally, 48 hours after Mifeprex).
4. The dosage and administration section of the prescribing information no longer requires that Mifepristone be administered under the supervision of a licensed health care provider and allows prescribers to dispense Mifepristone to patient to self-administer outside of a supervised setting.
5. A repeat of 800 mcg buccal dose of Misoprostol may be used if needed.
6. The requirement that the follow up occur in the clinic 14 days after taking the Mifeprex was deleted.

¶14 The State filed a renewed motion for summary judgment in the trial court on September 8, 2016. In it, the State alleged that H.B. 2684 does not violate Nova's due process rights under the Oklahoma Constitution, nor does it

impose an undue burden on the federal right to termination, or violate state constitutional equal protection provisions. Nova filed a cross motion for summary judgment and the trial court held a hearing on the motions on October 6, 2017, and filed an order on November 9, 2017, declaring H.B. 2684 as unconstitutional in all applications, and therefore void and of no effect. The State appealed the order on December 5, 2017, and we retained the cause on January 2, 2018.

I.

¶15 DECISIONS FROM THE UNITED STATES SUPREME COURT ARE BINDING ON THIS COURT WHERE THE UNITED STATES SUPREME COURT HAS SPOKEN, THIS COURT IS BOUND BY ITS PRONOUNCEMENTS.

¶16 The Supremacy Clause of the United States Const. Art. VI provides in pertinent part:

> . .This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution notwithstanding. . . .

Art. 1, §1 of the Oklahoma Constitution provides:

> The State of Oklahoma is an inseparable part of the Federal Union, and the Constitution of the United States is the supreme law of the land.

Decisions from the United States Supreme Court are binding on this Court and require the Legislature to promulgate rules of law consistent with the federal Constitution.[15] Because the United States Supreme Court has spoken, this Court is not free to impose its own view of the law as it pertains to the competing interests involved.[16] Where the United States Supreme Court has spoken, this Court is bound by its pronouncements.[17]

¶17 The Kansas Supreme Court in Hodes & Nauser v. Schmidt, No. 114, 153, 2019 WL 1868843, determined on April 26, 2019, that there was a constitutional right to abortion under the Kansas Constitution. We have never made such a determination under the Oklahoma Constitution, and we need not do so now. The Okla. Const. Art. 1, §1 mandates this Court comply with federal constitutional law on issues of federal law. It is mandatory that we uphold and comply with the highest law of this land.[18] The limited role of this Court as with all state courts, "is to apply federal constitutional law, not to make it nor to guess what it may become."[19] By virtue of our constitutional oath of office, we have solemnly sworn to uphold the Constitution of the United States.[20]

¶18 Likewise, Art. VI, clause 3 of the United States Constitution provides:

> The Senators and Representatives before mentioned and Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

¶19 In Cooper v. Aaron, 358 U.S. 1, 18, 78 S.Ct. 1401, 1410, _ L.Ed. __ (1958), the United States Supreme Court unanimously, stated that:

> Article VI of the Constitution makes the Constitution the 'supreme Law of the Land.' In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as "the fundamental and paramount law of the nation," declared in the notable case of Marbury v. Madison, 1 Cranch 137, 5 U. S. 177, that 'It is emphatically the province and duty of the judicial department to say what the law is.' This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the Brown case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States 'any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.' Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, cl. 3 'to support this Constitution.' Chief Justice Taney, speaking for a unanimous Court in 1859, said that this requirement reflected the framers' 'anxiety to preserve it [the Constitution] in full force, in all its powers, and to guard against

> resistance to or evasion of its authority, on the part of a State. . . .' Ableman v. Booth, 21 How. 506, 16 L.Ed.169.
>
> No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it. . . . [21]

¶20 The United States Supreme Court's most recent pronouncement, Whole Woman's Health v. Hellerstedt, 579 U.S. __, 136 S.Ct. 2292, 195 L.Ed.2d 665 (2016) explains the analysis necessary to decide this cause. It is under Whole Woman's Health v. Hellerstedt, supra, Burns, supra, and the United States Constitution's guidance we answer the question in this cause. The test for such a challenge of a legislative health regulation concerning medical termination, has already been recognized by Burns, supra, and Hellerstedt, supra. It is whether a statute has the effect of placing a substantial obstacle in the path of a woman's choice and imposes an undue burden on the woman's right which is the issue here.[22]

II.

¶21 THE LEGISLATURE'S REQUIREMENT THAT PHYSICIANS ADHERE TO THE FDA'S 2000 LABEL PROTOCOL FOR MEDICATION TERMINATION, RATHER THAN THE MORE EFFECTIVE CURRENT 2016 LABEL PROTOCOL, PLACES A SUBSTANTIAL OBSTACLE IN THE PATH OF A WOMAN'S CHOICE AND IMPOSES AN UNDUE BURDEN ON THE WOMAN'S RIGHTS PURSUANT TO UNITED STATES SUPREME COURT PRECEDENT AS IT CURRENTLY EXISTS.

¶22 The arguments in this cause (Cline IV), concern the alleged violation of women's due process right under the Oklahoma and Federal Constitutions. Nova argues that H.B. 2684 imposes an undue burden on Oklahoma women because it offers no medical or health benefits, serves no compelling state interest or any valid state interest, and actually threatens the health and rights of Oklahoma women. It contends that H.B. 2684 prohibits the most up-to-date and scientifically-sound medication treatment practices and impinges upon a woman's fundamental right to choose termination, to bodily integrity, and to equal protection under the law.

¶23 The State argues that there is no protected right to termination under the Oklahoma Constitution. It also argues that H.B. 2684 does not create an undue burden under the Federal Constitution, and that it actually promotes methods safer than the methods being prohibited. The undisputed question before us is whether H.B. 2684, which requires physicians to adhere to the FDA's approved protocol at the time H.B. 2684's enactment (*i.e.* the 2000 protocol) violates a woman's due process rights when the mandated adherence is to an obsolete drug regimen that has been updated by practitioners, medical experts, professional organizations, and the FDA itself (the 2016 protocol).

¶24 The equal protection clause of the fourteenth amendment requires that no state "deny to any person within its jurisdiction the equal protection of the laws."[23] Due process protections encompassed within the Okla. Const. art. 2, §7 are generally coextensive with those of its federal counterpart.[24] Due process has a procedural component, which requires an inquiry into the constitutional adequacy of the State's procedural safeguards.[25] It also has a substantive component which bars certain governmental action despite the adequacy of procedural protections provided.[26]

¶25 Regarding legislative medical treatment regulations, we recently noted in Burns v. Cline, 2016 OK 121, ¶¶8-9, 387 P.3d 348:

> Every woman in this country has a constitutionally protected right to choose whether to terminate her pregnancy before viability. This right is protected from undue interference from the State. Although the State has a legitimate interest in protecting the health of a woman, legislation may be found unconstitutional where the purpose or effect creates an undue burden or obstacle to a woman seeking a lawful abortion. The United States Supreme Court has been clear that "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on that right." . . . A "State has a legitimate interest in seeing to it that abortion ... is performed under circumstances that insure maximum safety for the patient." Roe v. Wade, 410 U.S. at 150, 93 S.Ct. at 725. However, "a statute which while furthering [a] valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends." Casey, 505 U.S. at 877,

112 S.Ct. at 2820, 120 L.2d. at 674. (Footnotes omitted).

¶26 Hellerstedt, supra, requires us to look at the burdens a law imposes on termination access together with the benefits the law confers. The benefit/burden question is not based solely upon the legislative findings explicitly set forth in the statute.[27] Rather, the Court must consider the evidence in the record – including expert evidence, presented in stipulations, depositions and testimony. The asserted benefits are weighed against the burdens as presented by the evidence before the trial court.

¶27 Though Legislative findings are not dispositive, they must be considered.[28] H.B. 2684 contains numerous Legislative findings.[29] These Legislative findings overwhelmingly reference, and give great deference to, an FDA FPL that is now outdated. The findings indicate that safe use of medical terminating drugs is heavily dependent upon adherence to the protocol approved by the FDA, while H.B. 2684 simultaneously requires physicians to adhere to a regime that **is no longer the current protocol approved by the FDA**. As several members of this Court noted in Burns:

> [T]he detailed findings of 63 O.S. Supp. 2014 1 – 729a (based on the outdated FDA final printed labeling) which are used to justify adherence to the FDA final printed labeling, are now not only at odds with the prevailing standard of care but also at odds with the current FDA-approved regime itself.

2016 OK 99 at ¶11 (Combs, V.C.J., concurring specially).

¶28 We turn to the evidence before the trial court in this cause and the important differences between the protocols. There are three main differences in the original 2000 protocol and the current 2016 protocol: 1) the usage of the termination-inducing drugs through gestation requirements; 2) the required doctor's office visits, self-administration, and follow up visits; and 3) the change in the amount and timing of the dosage of the drugs. The current FDA approved regimen allows usage through 70 days of gestation. H.B. 2684 restricts usage to 49 days of gestation. The only legislative stated benefits of this restriction in the statute, besides to generally protect women from dangerous and potentially deadly off-label use of termination-inducing drugs and to ensure physicians abide by the FDA approved protocol, is to reduce the risk of complications which are alleged to increase with gestational age.[30]

¶29 The State contends that increased gestational age increases the risks of infection, failed termination necessitating surgical intervention, and clinically significant hemorrhaging and the need for blood transfusion increases. In support of this contention, the State relies on the affidavit of its medical expert, Dr. Donna Harrison, a Michigan doctor who serves as the executive director of the American Association of Pro-Life Obstetricians and Gynecologists.[31] Dr. Harrison's affidavit addresses the issue of gestational age and argues:

> [w]hile it is true that the buccal regimen outlines in the current FDA label is more effective AFTER 49 days than the doses of drugs and route of administration specified in the original FDA regimen, that effectiveness comes at the cost of significant safety issues surrounding the buccal use of Misoprostol....[32]

Dr. Harrison's statement indicates that even though failure rate increases with increased gestational age, the new regime is still overall more effective than the prior one. The safety issue with which Dr. Harrison appears to be most concerned is increased risk of bleeding, based on an ACOG practice bulletin determining that the risk of bleeding may be lower in women who undergo medical treatment of gestations up to 49 days as opposed to a longer period.[33]

¶30 Nova counters that the 2000 FDA protocol relied on clinical trials conducted in the early 1990's and after nearly two decades of clinical experiments and medical studies, it has been confirmed that mifepristone is as safe and effective when prescribed in lower dosages and later in pregnancy and that because of such studies, the 2016 protocol is superior to the 2000 protocol.[34] Nova relies on several sources to support its evidence including: 1) the affidavit of Dr. Lisa Rarick who worked at the FDA from 1988 to 2003 in a number of positions and who currently serves as a consultant for Reproductive Health and Regulatory Affairs; the Center for Drug Evaluation and Research Medical Review completed March 29, 2016; 2) the affidavit of medical expert Dr. Daniel Grossman, a professor in the Department of Obstetrics, Gynecology and Reproductive Sciences at the University of California, San Francisco, who served as an active participant of

many medical organizations including the ACOG; and 3) the March 2014 and 2016 ACOG bulletins.[35]

¶31 The burden imposed by the 49-day gestational period as opposed to the 70-day period is one of timing. The 49-day period gives much less time to discover the pregnancy, and to decide whether to terminate it. Beyond that, Dr. Grossman's affidavit details several reasons why a longer period for medication termination is beneficial to patients: because many choose it for privacy reasons; because it feels natural; because of past trauma; or because it is specifically medically indicated.[36] The alleged benefit to the 49-day period is that it lowers a risks of infection, surgical intervention and hemorrhaging. However, we have found nothing in the record which shows these risks are significantly increased at all by waiting 70 days, especially when combined with lower dosages.[37] Given the FDA's rigorous review, it would be unimaginable that the FDA would revise and update a protocol to one less safe or less effective than the original it approved sixteen years earlier. Rather, the evidence shows the 2016 protocol to be safer with little to no significant health-related problems occurring.

¶32 Next, we consider the required three office visits for patients and administration of the drugs in a clinic, medical office or hospital, with a fourteen day follow up after administration to confirm termination under the 2000 protocol. Comparatively, the 2016 protocol allows self-administration outside of a supervised setting and no fourteen day follow up. The legislative statement in H.B. 2684 and the State note that at least 14 women have died after receiving a medication abortion.[38] Of those women, eight deaths were attributed to severe bacterial infections following the medication abortion. Nevertheless, the State concedes that there have been no reports of women dying in the U.S. from bacterial infection after use of the medication as utilized by the original 2000 FDA regimen. Nor does the State attribute any of the deaths to the 2016 protocol.

¶33 According to the State, the benefit of the extra doctor's office visit and follow up appointment, as described by their expert witness, Dr. Harrison, is that one in twenty women will not need misoprostol at all because their termination is completed within 48 hours and a visit to the doctor's office would verify this and reduce exposure to some women of the risks of misoprostol which could have been avoided.[39] Self-administration will lead to an increased failure rate whereas in-clinic administration guarantees the correct timing of the drug administration, better monitoring for bleeding, vital signs, and pain by trained physicians and lower risk of hospital admission, unsuccessful termination and death.[40]

¶34 Nova counters with expert testimony describing several studies that show that only 1.6 out of every 1000 patients experienced any significant adverse events such as hospital admission, blood transfusion, intravenous antibiotics, infection, etc. and fewer than 6 out of 10,000 experienced complications resulting from hospital admissions.[41] Another study showed only 3.1 out of every 1000 patients experienced any similar major complications.[42] Regarding the total of eight fatal bacterial infections reported in the U.S. since the original protocol, the FDA has determined that no causal relationship can be established between the medical termination and the infections.[43] According to Dr. Grossman and the ACOG, similar infections have also occurred following spontaneous terminations, term delivery, surgical termination and cervical cone or laser treatment for cervical dysplasia. Another study detailing the effects of a similar law in Ohio showed that following the old protocol women were 3 times more likely to need additional intervention and experienced more side effects.[44]

¶34 Nova also points to additional burdens: women who fall between the 50 and 70 day time limit would be forbidden from accessing a medical termination, even when that is the best option for them due to fear of surgical instruments, anesthesia or sedation, being victims of sexual assault or having certain medical or anatomical conditions despite the well-documented saftety of the current protocol. Access under the original protocol is more burdensome, costly and unpleasant. Traveling from rural areas might require a long journey or a two night stay away from home to access care, which increases costs for low-income patients, childcare, and time off from work and increases the chance that something might occur while traveling, making the procedure uncomfortable and more difficult to manage.[45]

¶36 It again appears that the evidence shows that there are no significant health-related problems which occur by utilizing the current protocol. In fact, the sixteen-year-old 2000 protocol would impose more health risks and cost related burdens than the current protocol. The

evidence strongly indicates adherence to the outdated protocol would make medication abortion more costly, less effective, and more prone to negative side effects.

¶37 Finally, we look at the difference in dosage requirements. The dosage of Mifeprex is decreased from 600 mg to 200 mg on day one in a single dose and then 800 mcg of misoprostol 24 to 48 hours after Mifeprex rather than 400 mcg. The State argues that the 2016 regimen may require double the dose of misoprostol, even if not necessarily needed and even though misoprostol is the drug most associated with infections that follow medication terminations.[46] It also contends that allowing women to self-administer at home will not guarantee the correct timing of the drug administration, or better monitoring of bleeding and vital signs.[47]

¶38 Nova's position, however, is that the widespread consensus within the medical community is that the current label protocol is the safest and most effective regimen for medication termination supported by nearly two decades of clinical experience and peer-reviewed medical literature confirming its safety and efficacy. Nothing in the record shows that the change in dosage requirement presents an increase of significant health risks. The affidavits of Nova's experts – relying on far more recent data, studies, and the rigorous determinations of the FDA itself – strongly indicate: 1) there is no established link between medical termination and fatal infection, as discussed above, supra; and 2) the new dosing regimen is both more effective than the prior regimen and also safer.[48]

¶39 We recognize that the burden imposed by each of the changes to usage, doctor's office visits, self-administration, and follow up visits, and the amount and timing of the dosage of the drugs may not individually amount to an undue burden, but as the United States Supreme Court said in Hellerstedt, supra, at page 2313:

> But here, those increases are but one additional burden, which when taken together with others that the closing [of half of the Texas' clinics] brought about, and when viewed in light of the virtual absence of any health benefit, lead us to conclude that the record adequately supports the District Court's "undue burden" conclusion.

While this cause does not involve any alleged closings, we agree with the Hellerstedt Court's analysis and also conclude that the trial court's decision in this cause was adequately supported by the record.

¶40 We are not alone in our assessment of the 2000 protocol vs the 2016 protocol. For example, in Planned Parenthood Arizona, Inc., v. Humble, 753 F.3d 905 (9th Cir. 2014), the Ninth Circuit Court of Appeals issued a preliminary injunction prohibiting enforcement of an Arizona statute which required compliance with the FDA 2000 protocol (called on-label), rather than the off-label, evidence-based regimen which is similar to the 2016 protocol. The Court noted that the evidence showed:

1) Virtually all abortion providers use the evidence-based regimen.
2) The ACOG strongly favors the evidence-based regimen over the on-label regimen.
3) The evidence-based regimen is considered the best practice and provides a clear advantage because most women do not discover their pregnancies until approximately 49 days.
4) Risk factors have been reduced or eliminated by the current regimen and fewer surgical interventions are necessary.
5) Medical abortion is less invasive than surgical abortion, and medical abortion is significantly safer.
6) The cost for the on-label is $160.00 more than the evidence-based regimen.
7) The evidence-based allows women to take misoprostol in their homes, eliminating the risk that they will pass the pregnancies, a process involving heavy bleeding and cramping, during their trip home.

The Court also noted that Arizona had presented no evidence whatsoever that the law furthered any interest in women's health. Taking into consideration the cost of the extra dosage of medicine, the cost of the clinic time and additional visits, including transportation, gas, lodging, the delay in terminations and increase in health risks, the law substantially burdened women's access to medical services. Accordingly, it granted the request for an injunction to preclude the law from going into effect because the plaintiffs were likely to succeed on the merits of their undue burden claim.[49]

¶41 Although Humble, supra, involved a preliminary injunction rather than decisions on the merits of the plaintiff's claims, and it is not

controlling here, the evidence presented is strikingly similar to this cause.[50] We agree with Nova that H.B. 2684 has the effect of placing a substantial obstacle in the path of a woman's choice and imposes an undue burden on the woman's right. Under United States Supreme Court precedent, H.B. 2684 is unconstitutional and therefore void and of no effect.

CONCLUSION

¶42 Medical negligence or malpractice actions arise when a provider renders care that falls below the acceptable standard of care. Today, nineteen years after the FDA approved the 2000 label protocol, the FDA has approved a 2016 regimen that providers across the country use as the superior protocol. Use of the 2000 protocol agreeably would necessarily now fall below the acceptable standard of care. Not only would doctors potentially be medically negligent for following such standards, but also pursuant to H.B. 2684 they would be charged with a felony, incarcerated, and lose their license to practice through disciplinary proceedings for not following such sub-standard practices.

¶43 Notwithstanding the effects H.B. 2684 has on doctors' liability, this Court's decision in Burns, supra, and the United States Supreme Court precedents require us to question whether a statute has the effect of placing a substantial obstacle in the path of a woman's choice and imposes an undue burden on the woman's right.[51] Under the facts and evidence presented in this cause, we agree with the trial court that H.B. 2684 does place a substantial obstacle in the path of a woman's choice and imposes an undue burden on the woman's right. The Constitution and the laws of the United States made in pursuance thereof shall be the supreme law of the land and senators, representatives, executive and judicial officers of this state are bound by oath to support this Constitution. Consequently, we affirm the trial court's declaration that H.B. 2684 is unconstitutional, void and of no effect. We reiterate what we said in In re Initiative Petition No. 349, State Question 642, 1992 OK 122, ¶13, 838 P.2d 1, 7. "We will uphold the law of the land whatever it may be. Today the law of the land is that a woman has a constitutionally protected right to make an independent choice to continue or terminate a pregnancy before viability."

STAY LIFTED; TRIAL COURT AFFIRMED.

GURICH, C.J., KAUGER, EDMONDSON, COLBERT, REIF, JJ., concur.

COMBS, J., concurs specially [by separate writing].

WINCHESTER, J., concurs in result.

DARBY, V.C.J., dissents [by separate writing].

COMBS, J., with whom Gurich, C.J., Kauger and Reif, JJ., join, concurring specially:

¶1 I concur in the majority's conclusion under the facts presented in this cause, H.B. 2684, 2014 Okla. Sess. Laws ch. 121 (H.B. 2684), places a substantial obstacle in the path of a woman's choices and creates an undue burden on the woman's rights. I write to reemphasize my writing in *Oklahoma Coalition For Reproductive Justice v. Cline*, wherein I noted this Court's prior disapproval of a law's drastic interference in the role of physicians which restricted the use of abortion-inducing drugs to the regime in the final printed labeling as being "so completely at odds with the standard that governs the practice of medicine that it can serve no purpose other than to prevent women from obtaining abortions and to punish and discriminate against those who do." 2016 OK 17, ¶4, 368 P.3d 1278 (Combs, V.C. J., concurring specially).

¶2 I stated then and restate now H.B. 2684 requires adherence to a protocol in contravention of prevailing medical standards; one that simultaneously shrinks the window in which medication abortion is accessible to the women of Oklahoma.

¶3 This is an issue of supremacy with the federal courts. Previous opinions emphasized that by virtue of the constitutional oath of office taken by members of this Court as well as all state courts we have sworn to uphold the Constitution of the United States which we acknowledged limits our role to applying federal constitutional law and not making it nor guessing what it may become. *In re Initiative Petition No. 349, State Question No. 642*, 1992 OK 122, ¶13, 838 P.2d 1; *see also Burns v. Cline*, 2016 OK 121, ¶7, 387 P.3d 348. The judicial department is not the only body to take this oath. Every public official in the three departments of government in the state of Oklahoma takes the same constitutional oath of office. Okla. Const. art. XV, § 1. That oath begins with a statement that the affiant will "support, obey and defend

the Constitution of the United States and the Constitution of the State of Oklahoma."

¶4 The Constitution of the United States provides in Art.VI:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 1 of Article 1 of the Constitution of the State of Oklahoma provides:

> The State of Oklahoma is an inseparable part of the Federal Union, and the Constitution of the United States is the supreme law of the land.

¶5 This Court is bound by federal jurisprudence, e.g., *Roe v. Wade*, 410 U.S. 113 (1973), *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992), and *Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292 (2016). In *Roe*, the United States Supreme Court devised a trimester framework for balancing a woman's constitutional right to an abortion with the State's interest in potential life.[1] *Roe*, 410 U.S. 113, 165-166. Later in *Casey,* the Supreme Court rejected the rigid trimester framework and now uses "viability" as the relevant point at which a State may begin limiting a woman's access to abortion for reasons unrelated to maternal health. *Casey*, 505 U.S. 833, 878; *see also Hellerstedt*, 136 S. Ct. 2292, 2320. The Supreme Court also adopted an undue burden analysis and under this analysis an undue burden exists which renders the offending law invalid if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability. *Casey*, 505 U.S. 833, 878. Until overturned by the Supreme Court, all of Oklahoma and each department are bound by the Supreme Court's jurisprudence, and any legislation which places limits on a woman's right to an abortion of a previable fetus must pass this undue burden test.

DARBY, V.C.J., DISSENTING:

¶1 I respectfully dissent. "It is not the purpose of summary judgment to substitute [a] trial by affidavit for a trial according to law."[1] "Summary judgments are disfavored and should only be granted when it is clear there are no disputed material fact issues."[2] The moving party has the burden to show there is no substantial controversy as to any material fact.[3] After this showing, the opposing party must demonstrate existence of a material fact in dispute which would justify a trial; circumstantial evidence may satisfy this burden.[4] "Because the trial court has the limited role of determining whether there are such issues of fact, it may not determine fact issues on a motion for summary judgment nor may it weigh the evidence."[5]

¶2 Rule 13(b) of the Rules for District Courts of Oklahoma provides that "[a]ll material facts set forth in the statement of the movant which are supported by acceptable evidentiary material shall be deemed admitted for the purpose of summary judgment . . . unless specifically controverted by the statement of the adverse party which is supported by acceptable evidentiary material."[6] The State filed its Renewed Motion for Summary Judgment and supported all of its "undisputed material facts" with acceptable evidentiary material.[7] In its Cross Motion for Summary Judgment and Opposition to Defendants' Renewed Motion for Summary Judgment, Nova failed to follow the requirements of Rule 13 to set forth and number each specific material fact which it claimed to be in controversy.[8] Instead, Nova stated its own "undisputed material facts," citing to its motion to strike the State's expert's affidavit. The State then argued that because Nova failed to follow Rule 13, the State's "undisputed material facts" should be deemed admitted; but the State *also* failed to properly dispute Nova's "undisputed material facts" under Rule 13. In its reply, Nova argued that

> Plaintiffs have by no means admitted all of the facts alleged in Defendants' Renewed Motion for Summary Judgment. Both parties have filed cross-motions for summary judgment, *each with their own versions of undisputed, relevant facts*. Thus, there can be no doubt that Plaintiffs contest Defendants' alleged facts.[9]

Nova then provided several examples of contradictions in the various versions of material facts. Nova also supported its "undisputed material facts" with acceptable evidentiary material. The parties opposing the motions for summary judgment had the burden to bring evidence to show the facts were in dispute,[10] and both did so.

¶3 In ruling on Nova's request that the court strike the State's expert's affidavit, the district court said it

> was not willing to strike [the expert's affidavit] on the basis of ["]is she right,[" "]are we right,["] and who has the evidence to support it. I think both of them are qualified and have some evidence that may be able to be attacked on cross-examination but not on grounds to strike the affidavit.[11]

Rule 13 goes on to require:

> If it appears to the court that there is no substantial controversy as to the material facts and that one of the parties is entitled to judgment as a matter of law, the court shall render judgment for said party.
>
> If the court finds that there is no substantial controversy as to certain facts or issues, the court may enter an order specifying the facts or issues which are not in controversy and direct that the action proceed for a determination of the remaining fact or issues.[12]

Given that the parties and the district court acknowledge that the parties disputed each other's stated "undisputed material facts" and supported their respective claims with evidentiary material, the district court had no authority under Rule 13 to grant summary judgment to any movant.

¶4 The district court should have answered the initial question of whether disputed material fact issues remained. Skipping over that part of the analysis, however, the district court granted summary judgment to Nova without ever identifying which "undisputed" facts it relied upon, explaining how H.B. 2684 imposes an undue burden, or determining which protocol (old, new, or off-label) is safer and to what degree. The district court's order explains the history of this case through *Cline III* and gives the additional information that in March 2016, the FDA approved an updated protocol which it determined was safe and effective and which Nova now follows. The order granting summary judgment to Nova states:

> This Court finds that the Act fails under the undue burden standard because it would place a substantial obstacle in the path of a women seeking a pre-viability abortion. Specifically, this Court finds that the burdens imposed by the Act exceed its benefits, and further, that the burdens imposed by the Act are undue.

We do not know whether the district court found there were no disputed material facts or whether it, in effect, conducted a trial by affidavit – no testimony, no cross-examination, and no opportunity for rebuttal.

¶5 Upon appellate review, "[s]ummary judgment will be affirmed only if the appellate court determines that there is no dispute as to any material fact and that the moving party is entitled to judgment as a matter of law."[13] Summary judgment settles only questions of law and the standard of review for those questions is *de novo*.[14] The district court gave us a decision on the constitutionality of H.B. 2684, but we do not know on what evidence it based its decision, especially in light of the many conflicting material facts contained in the submitted affidavits of the parties. The facts, which remain in dispute, are material to the analysis mandated by the United States Supreme Court[15] and applied by the majority. These disputed facts include the determinations regarding the potential medical or health benefits of the 2000 protocol versus the relative safety or dangers of the 2016 protocol or other off-label protocols.

¶6 The majority sidesteps and expands the limited role of the district court in considering a motion for summary judgment by conducting an evidentiary "trial" by affidavit – deciding which evidence it finds credible, which it finds persuasive, and which it finds outweighs the other side's evidence. A fact-finding exercise of this nature should only be conducted by the district court – by trial or evidentiary hearing. This is improper for the Court, even under *de novo* review.

¶7 Because material questions of fact remain in this case and the district court did not follow the rules of civil procedure, I would find the district court erred in granting summary judgment. I would reverse and remand the case to the district court for further proceedings not inconsistent herewith. Therefore, I respectfully dissent.

PER CURIAM:

1. The Okla. Const., art. 5, §1 provides:
The Legislative authority of the State shall be vested in a Legislature, consisting of a Senate and a House of Representatives; but the people reserve to themselves the power to propose laws and amendments to the Constitution and to enact or reject the same at the polls independent of the Legislature, and also reserve power at their own option to approve or reject at the polls any act of the Legislature.

2. The Okla. Const., art. 5, §59 provides:

> Laws of a general nature shall have a uniform operation throughout the State, and where a general law can be made applicable, no special law shall be enacted.

3. Planned Parenthood Arkansas & Eastern Oklahoma v. Jegley, 2016 WL 6211310(E.D. Ark. 2016) was decided on March 14, 2016, before the 2016 protocol was adopted. The United States District Court for E.D. Arkansas, Western Division, in an unpublished order issued a preliminary injunction enjoining Arkansas from enforcing the Arkansas Abortion-Inducing Drugs Safety Act (Arkansas Act). The Arkansas Act required that medication abortions follow the FDA's 2000 protocol as outlined in the drug label rather than any off-label use. The plaintiffs were following an off-label protocol that resembled the current 2016 protocol in both requirements, usage through gestation (63 days instead of 70), administration of the medication and hospital or clinical visits. In issuing the injunction, the court made several findings regarding the FDA 2000 label protocol. It referred to the dosage and usage through gestation of 63 day or 9 weeks as "evidence-based regimen" because of the large body of evidence regarding safety and effectiveness. It also determined, based on record evidence very similar to the evidence in this cause that: 1. The evidence showed that the failure rate was far less than the 2000 label protocol; 2. The ACOG and the American Medical Association found the 2016 protocol to be superior and safer and to cause fewer complications as compared to the 2000 protocol; 3. The FDA has expressly recognized the evidence-based use of medications is an appropriate part of medical practice and has never taken steps to restrict it or preclude doctors from such off-label use; 4. There is no established causal link between the abortion inducing drugs and the eight contracted fatal infections and even if there was, there is a very low risk of such a fatal infection; 5. The 2000 regimen takes far longer to complete and clinical observation under it may not be feasible for patients; 6. The 2000 regimen has an additional increased cost, and the 600 mcg of required mifepristone is a very expensive medicine; 7. Under the 2000 regimen women between 50 and 63 days would not have access to medication abortions at all; 8. Every time women travel for access for abortion services, they will have to arrange necessary funds, transportation, child care, and time off work required to travel; 9. Increased travel distances and costs, both monetary and otherwise, may cause women who otherwise would have obtained an abortion not to obtain one at all; 10. Increased travel distance and costs will force women into later abortions that are both riskier and more expensive, if they can obtain them at all and may cause some women to take desperate measures, such as attempting to self-abort or seek care from unsafe providers, putting their health at risk. 11. Cost is a significant barrier for women because 42.4% of abortion patients have incomes below the poverty line; 12. Far fewer women chose medication abortions in states which restrict doctors to the 2000 regimen; and 13. Medical negligence or malpractice actions arise when providers render care that falls below the acceptable standard of care and today, the 2000 regimen falls below the acceptable standard of care as the evidence-based regimen is used by providers across the county. On appeal, the 8th Circuit, in an unpublished opinion on July 28, 2017, remanded the cause for additional fact finding and the United States Supreme Court denied certiorari on May 29, 2018. Subsequently, the parties filed a joint motion to vacate the preliminary injunction and dismiss appeal which was granted by the 8th Circuit on November 9, 2018.

4. Art. 1, §1, Okla. Const., *see* page 13, infra; Art. 6, the United States Const., *see* page 14, infra.

5. Okla. Coal. for Reprod. Justice v. Cline, 2013 OK 93, ¶ 25, 313 P.3d at 262 (Cline II).

6. Okla. Coal. for Reprod. Justice v. Cline, 2012 OK 102, ¶3, 292 P.3d 27, 27-28 (Cline I).

7. *See* Cline v. Okla. Coal. for Reprod. Justice, 570 U.S. 930, 133 S. Ct. 2887, 196 L.Ed.2d 932 (2013).

8. Cline II, *see* note 5, supra at ¶8.

9. *See* Cline II, *see* note 5, supra at ¶1; Cline v. Okla. Coal. for Reprod. Justice, 571 U.S. 985, 134 S.Ct. 550 (Mem.), 187 L.Ed.2d 361 (2013).

10. The FPL states that before administrating Mifeprex, physicians should provide patients with an explanation of the procedure along with a copy of the medication guide and patient agreement. The FPL also states that afterward, the physician should provide notice to the manufacturer of any ongoing pregnancy or serious adverse events.

11. Since the FPL's approval, eight fatal bacterial infections have been reported in the United States where the women were administered Mifeprex and misoprostol for a medication termination and did not follow the FPL, but followed an off-label protocol. The FDA has not established a casual connection between the off-label protocol and the deaths. However, the FDA now warns on the FPL about the risk of a bacterial infection following Mifeprex's use. These same fatal bacteria also occur following other obstetric and gynecologic processes.

12. The Okla. Const., art 5, §59, *see* note 2, supra.

13. The State, in its Renewed Motion for Summary Judgment acknowledges on page 3, subsection 5 that:

> In 2014, the Legislature passed H.B. 2684, citing the facts in the paragraph above in its legislative findings and allowing physicians to induce abortions using mifepristone and misoprostol only in accordance with the original FDA regimen.

14. In the transcript of the August 25, 2017, hearing p. 22, the trial court stated "now the argument from the State is not so much prohibiting off-label use, but it is prohibiting even the current final printed label use, correct? To which the State replied "Yes."

15. *See*, Burns v. Cline, 2016 OK 121, ¶5, 387 P.3d 348; United States v. Home Fed. S. & L. Ass'n of Tulsa, 1966 OK 135, ¶18, 418 P.2d 319.

16. Cooper v. Aaron, 358 U.S. 1, 18, 78 S.Ct. 1401, 1410, __ L.Ed. __ (1958) [Interpretation enunciated by this Court is the supreme law of the land, and Art. VI of the Constitution or makes it of binding effect on the States.].

17. United States Const. Art.VI, Okla. Const. Art. 1, §1, Burns v. Cline, *see* note 15, supra.

18. In re Initiative Petition No. 349, State Question 642, 1992 OK 122, ¶13, 838 P.2d 1, 7.

19. Burns v. Cline, *see* note 15, supra.

20. Burns v. Cline, *see* note 15, supra.

21. Byrd v. Trombley, 580 F. SupP.2d 542, 552 (U.S. E.D. Michigan 2008).

22. WholeWoman's Health v. Hellerstedt, 579 U.S. __, 136 S.Ct. 2292, 195 L.Ed.2d 665 (2016). This test evolved from the Court's reaffirmation of Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), in Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), and subsequent decisions in Gonzales v. Carhart, 550 U.S. 124, 127 S.Ct. 1610, 167 L.Ed.2d 480 (2007), and Hellerstedt, supra.

23. The United States Const., amend. XIV; Nelson v. Nelson, 1998 OK 10, ¶11, 954 P.2d 1219.

24. The Okla. Const. art. 2, §7 provides:

> No person shall be deprived of life, liberty, or property, without due process of law.

Nelson v. Nelson, *see* note 23, supra.

25. Nelson v. Nelson, *see* note 23, supra at ¶15; Matter of Adoption of J.R.M., 1995 OK 79, ¶12, 899 P.2d 1155; Zinermon v. Burch, 494 U.S. 113, 110 S.Ct. 957, 108 L.Ed.2d 100 (1990);.

26. Nelson v. Nelson, *see* note 23, supra at ¶15; Matter of Adoption of J.R.M., *see* note 25, supra at ¶13; Daniels v. Williams, 474 U.S. 327, 332, 106 S.Ct. 662, 665, 88 L.Ed. 2d 662 (1986).

27. Hellerstedt, *see* note 22, supra at 2310.

28. Hellerstedt, *see* note 22, supra at 2310.

29. Title 63 O.S. Supp. 2014 § 1-729a(A) provides:

> A. The Legislature finds that:
>
> 1. The U.S. Food and Drug Administration (FDA) approved the drug mifepristone (brand name "Mifeprex"), a first-generation [selective] progesterone receptor modulator ([S] PRM), as an abortion-inducing drug with a specific gestation, dosage, and administration protocol;
>
> 2. The FDA approved mifepristone (brand name Mifeprex) under the rubric of 21 C.F.R., Section 314.520, also referred to as "Subpart H", which is the only FDA approval process that allows for postmarketing restrictions. Specifically, the Code of Federal Regulations (CFR) provides for accelerated approval of certain drugs that are shown to be effective but "can be safely used only if distribution or use is restricted";
>
> 3. The FDA does not treat Subpart H drugs in the same manner as drugs which undergo the typical approval process;
>
> 4. As approved by the FDA, and as outlined in the Mifeprex final printed labeling (FPL), an abortion by mifepristone consists of three two-hundred-milligram tablets of mifepristone taken orally, followed by two two-hundred-microgram tablets of misoprostol taken orally, through forty-nine (49) days LMP (a gestational measurement using the first day of the woman's "last menstrual period" as a marker). The patient is to return for a follow-up visit in order to confirm that the abortion has been completed. This FDA-approved protocol is referred to as the "Mifeprex regimen" or the "RU-486 regimen";
>
> 5. The aforementioned procedure requires three office visits by the patient, and the dosages may only be administered in a clinic, medical office, or hospital and under supervision of a physician;
>
> 6. The Mifeprex final printed labeling (FPL) outlines the FDA-approved dosage and administration of both drugs in the Mifeprex regimen, namely mifepristone and misoprostol;

7. When the FDA approved the Mifeprex regimen under Subpart H, it did so with certain restrictions. For example, the distribution and use of the Mifeprex regimen must be under the supervision of a physician who has the ability to assess the duration of pregnancy, diagnose ectopic pregnancies, and provide surgical intervention (or has made plans to provide surgical intervention through other qualified physicians);
8. One of the restrictions imposed by the FDA as part of its Subpart H approval is a written agreement that must be signed by both the physician and patient. In that agreement, the woman attests to the following, among other statements:
a. "I believe I am no more than 49 days (7 weeks) pregnant",
b. "I understand that I will take misoprostol in my provider's office two days after I take Mifeprex (Day 3)", and
c. "I will do the following: return to my provider's office in two days (Day 3) to check if my pregnancy has ended. My provider will give me misoprostol if I am still pregnant";
9. The FDA concluded that available medical data did not support the safety of home use of misoprostol, and it specifically rejected information in the Mifeprex final printed labeling (FPL) on self-administering misoprostol at home;
10. The use of abortion-inducing drugs presents significant medical risks to women, including but not limited to abdominal pain, cramping, vomiting, headache, fatigue, uterine hemorrhage, viral infections, and pelvic inflammatory disease;
11. Abortion-inducing drugs are associated with an increased risk of complications relative to surgical abortion. The risk of complications increases with advancing gestational age, and, in the instance of the Mifeprex regimen, with failure to complete the two-step dosage process;
12. In July 2011, the FDA reported 2,207 adverse events in the United States after women used abortion-inducing drugs. Among those were 14 deaths, 612 hospitalizations, 339 blood transfusions, and 256 infections (including 48 "severe infections");
13. "Off-label" or so-called "evidence-based" use of abortion-inducing drugs may be deadly. To date, fourteen women have reportedly died after administering abortion-inducing drugs, with eight deaths attributed to severe bacterial infection. All eight of those women administered the drugs in an "off-label" or "evidence-based" manner advocated by many abortion providers. The FDA has received no reports of women dying from bacterial infection following administration according to the FDA-approved protocol for the Mifeprex regimen. The FDA has not been able to conclude one way or another whether off-label use led to the eight deaths;
14. Medical evidence demonstrates that women who utilize abortion-inducing drugs incur more complications than those who have surgical abortions;
15. Based on the foregoing findings, it is the purpose of this act to:
a. protect women from the dangerous and potentially deadly off-label use of abortion-inducing drugs, and
b. ensure that physicians abide by the protocol approved by the FDA for the administration of abortion-inducing drugs, as outlined in the drugs' final printed labeling (FPL); and
16. In response to the Oklahoma Supreme Court's decision in *Cline v. Oklahoma Coalition for Reproductive Justice* (No. 111,939), in which the Oklahoma Supreme Court determined, in contravention of this Legislature's intent, that this act prohibits all uses of misoprostol for chemical abortion and prohibits the use of methotrexate in treating ectopic pregnancies, it is also the purpose of this act to legislatively overrule the decision of the Oklahoma Supreme Court and ensure that should such questions be presented before that Court in the future it will reach the proper result that this act does not ban use of misoprostol in chemical abortion (and allows it as part of the FDA-approved Mifeprex regimen) nor prevent the off-label use of drugs for the treatment of ectopic pregnancy.

30. *See* 63 O.S. Supp. 2014 § 1-729a(A)(11), supra, note 29.

31. Dr. Harrison relies on the cited study of Mentula, Maarit, Niinimaki M, Suhonen S., Hemminki E., Gissler M., and Heinkinheimo O., "Immediate adverse events after second trimester medical termination of pregnancy: results of a nationwide registry study." Human Reproduction (0)(0) p 1-6 2011, the American College of Obstetricians and Gynecologist Practice Bulletin, and the original FDA protocol.

32. Affidavit of Donna Harrison, M.D., Defendant's Renewed Motion for Summary Judgment, Record On Accelerated Appeal, V. 1, Ex. 4, Ex. B, p.4

33. ACOG, Practice Bulletin No. 143: *Medical Management of the First-Trimester Abortion*, 2 (March 2014, reaffirmed 2016).

34. Plaintiff's Cross Motion for Summary Judgment, Record on Accelerated Appeal, Ex. 5, pp. 6-7.

35. ACOG, Practice Bulletin No. 143: *Medical Management of the First-Trimester Abortion*, 2 (March 2014, reaffirmed 2016).

36. As Dr. Grossman explains in his affidavit:

12. For some women, medication abortion offers important advantages over surgical abortion. It can be performed earlier in pregnancy than surgical abortion and is less invasive. Many women prefer medication abortion because they consider the process to be more private, by allowing them to complete the abortion in the privacy of their homes with the support of a loved one at the time of their choosing. Others consider it to be more natural than surgical abortion, because it feels like a miscarriage.
13. Some women choose medication abortion because they fear any procedure with surgical instruments, or wish to avoid anesthesia or sedation. Victims of rape or women who have experienced sexual abuse or molestation, in particular, may choose medication abortion to feel more in control of the experience and to avoid the trauma of having instruments placed in their vagina.
14. For some women with certain medical or anatomical conditions, medication abortion rather than a surgical abortion is medially indicated. These conditions include cervical stenosis (tightly closed uterus), uterine anomalies (e.g., bicornuate or double uterus, or an extremely flexed uterus), large uterine fibroids, and obesity, all of which an make it difficult to access the pregnancy inside the uterus as part of a surgical abortion.

Affidavit of Daniel A. Grossman, M.D., Plaintiff's Cross Motion for Summary Judgment, Record on Accelerated Appeal, Ex. 5, Ex. D, p. 5.

37. Again, from Dr. Grossman's affidavit:

> Numerous sources that Dr. Harrison cites – including those reviewed by the FDA and the ACOG Practice Bulletin – sanction the use of evidence-based medication abortion regimens for women up to a later point in pregnancy. **There is no valid safety or medical reason to limit availability to women up to 49 days' LMP, where the Updated Label Regimen followed by Reproductive Services allows medication abortions to be performed safely and effectively up to 10 weeks (*i.e*, 70 days) LMP**. This is particularly advantageous because many women do not detect their pregnancies until close to 49 days' LMP; thus, evidence-based regimens, like the Updated Label Regimen, allow more women to chose medication abortion.

Affidavit of Daniel A. Grossman, M.D., *see* note 36, supra at p. 16 (emphasis added) (footnotes omitted).

38. The dates of the deaths are not noted, but H.B. 2684 relies on a July 2011 FDA report in support of its statement.

39. Affidavit of Donna Harrison, M.D., *see* note 32, supra at pp. 8-9.

40. *See* Affidavit of Donna Harrison, M.D., *see* note 32, supra at pp. 10-14.

41. From Dr. Grossman's affidavit:

> ... [T]he FDA concluded that serious adverse outcomes were exceedingly rare "and do not suggest a safety profile different from the original approved Mifeprex dosing regimen."
> 35. Consistent with these findings, a recent large-scale study that reviewed the outcomes of 233,805 medication abortions performed in the United States found that only 1.6 out of every 1,000 patients experienced a significant adverse event (defined as hospital admission, blood transfusion, emergency department treatment, intravenous antibiotics administration, infection requiring treatment with intravenous antibiotics or admission to the hospital, or death), and fewer than six out of every 10,000 experienced complications resulting in hospital admission. Dr. Harrison fails to acknowledge thus study in her affidavit.

Affidavit of Daniel A. Grossman, M.D., *see* note 36, supra at p. 13-14 (footnotes omitted) (citing Kelly Cleland et al., Significant Adverse Events and Outcomes After Medical Abortion, 121 Obstet. & Gynecol. 166, 169 (2013)).

42. Affidavit of Daniel A. Grossman, M.D., *see* note 36, supra at p. 14 (citing Ushma D. Upadhyay et al., *Incidence of Emergency Department Visits and Complications After Abortion*, 125 Obstet. & Gynecol. 175, 175 (2015)).

43. Dr. Rarick notes:

> The FDA has concluded that no causal relationship has been established between the use of mifepristone and misoprostol and the occurence of clostridial infections. Indeed, the FPL for Mifeprex states unequivocally that "[n]o causal relationship ... has been established."

Affidavit of Lisa A. Rarick, M.D., Plaintiff's Cross Motion for Summary Judgment, Record on Accelerated Appeal, Ex. 5, Ex. B, p. 11 (quoting FDA Medical Review, p. 26).

The same conclusion is expressed by Dr. Grossman. Affidavit of Daniel A. Grossman, M.D., *see* note 28, supra at p. 15 (citing American College of Obstetricians and Gynecologists, *Practice Bulletin No. 143* at p. 8; U.S. Food & Drug Admin., Mifeprex label, 2016 (revised Mar. 2016)).

44. Dr. Grossman's affidavit addresses this issue succinctly:

> 42. In fact, a recent study found that after an Ohio law mandating compliance with the Outdated Label Regimen went into effect, women were more likely to need additional intervention, experienced more side effects, and faced higher costs relative to the evidence-based regimen previously in effect. Rather than improved abortion outcomes, the evidence demonstrated the opposite – costs and complications rose. Patients subjected to the Outdated Label Regimen were three times more likely to need an extra round of medication or a more invasive procedure (such as an aspiration abortion), three times more likely to have an incomplete abortion or possible incomplete abortion, and "significantly more likely" to suffer side effects such as nausea and vomiting. In addition, there was a significant decline in the percentage of medication abortions, from 22 percent before the law took effect, to 7 percent afterwards. This comparative study further demonstrates that laws adhering to outdated regimens, like HB 2684, fail to protect women or make abortion safer or more effective.

Affidavit of Daniel A. Grossman, M.D., *see* note 36, supra at pp. 17-18 (quoting Upadhyay et al., *Comparison of Outcomes Before and After Ohio's Law Mandating Use of the FDA-Approved Protocol for Medication Abortion: A Retrospective Cohort Study*, PloS Med. 13(8) (Aug. 30, 2016), available at https://doi.org/10.1371/journal.pmed.1002110.

45. Plaintiff's Cross Motion for Summary Judgment, supra note 43, pp. 16-17; Affidavit of Daniel A. Grossman, M.D., *see* note 36, supra at pp. 16, 21, & 25.

46. Dr. Harrison asserts:

> 22. ... [T]he lower 200mg oral dose of Mifepristone used in the various off-label regimens, including plaintiffs' regimen, is known to be less effective in killing the fetus. This lower dosage of Mifepristone necessitates larger doses of Misoprostol to complete the abortion. (800 micrograms in the plaintiffs' regimen, compared to 400 micrograms in the original FDA regimen.)
>
> 23. The original FDA regimen offers a significant safety advantage over the plaintiffs' regimens by decreasing a woman's exposure to Misoprostol. This lower dose of Misoprostol is safer than the high dose used in the plaintiffs' regimens because it is the Misoprostol component of the drug-induced abortion regimen that has been most recently implicated in the massive fatal infections seen after some medical abortions, as explained above.

Affidavit of Donna Harrison, M.D., supra note 32, at p. 9 (footnotes omitted) (citing Creinin M., *Medical Abortion Regimens: Historical Context and Overview*, Am. J. Obstet. Gynecol. 183 (2) suppl. pp. S3-S9 (Aug. 2000); Spitz I.M., *Mifeprestone: Where do We Come from and Where are we Going? Clinical Developent Over a Quarter of a Century,* Contraception 82, pp. 442-452 (2010)).

47. Affidavit of Donna Harrison, M.D., *see* note 32, supra at pp. 10-15.

48. *See* Affidavit of Lisa A. Rarick, M.D., *see* note 43, supra at pp. 11-12; Affidavit of Daniel A. Grossman, M.D., *see* note 36, supra at pp. 11-12.

49. The U.S. Court of Appeals for the Ninth Circuit, reversed the trial court's denial of the preliminary injunction and ordered that the law be blocked while the case proceeds. The law is currently not in effect. On December 15, 2014, the U.S. Supreme Court denied the State's petition to review the case. A second lawsuit in state court in Arizona was filed April 6, 2014, and alleged that the law violates the Arizona Constitution, which forbids the legislature from relinquishing its authority to make state law, and also that the Arizona Department of Health violated its own rulemaking procedures when it drafted the regulation. On October 15, the trial court permanently blocked the law, ruling that the statute is an impermissable abdication of the Arizona legislature's obligation to make state law. On May 17, 2016, the Governor signed a new law that effectively repealed the challenged statute.

50. The State cites to two cases in support of their position. The more recent case, which we find unpersuasive, is Planned Parenthood of Greater Texas v. Abbott, 748 F.3d 583 (9th Cir. 2014) wherein the Ninth Circuit Court of Appeals partially upheld the constitutionality of a Texas law similar to H.B. 2684, The Court held, in part, that the Texas bill on its face did not impose an undue burden on the life and health of a woman. The second case, Planned Parenthood Southwest Ohio Region v. DeWine, 696 F.3d 490 (6th Cir. 2012) wherein the 6th Circuit Court of Appeals partially upheld an Ohio statute substantially similar to Oklahoma's, but did not expressly address whether the Ohio Act unduly burdens a women's right to health and life under the Fourteenth Amendment. The Court expressly noted the question was not at issue in the appeal.

51. United States Constitution, Art. VI, *see* pages 12-13, supra. WholeWoman's Health v. Hellerstedt, *see* note 22, supra. This test evolved from the Court's re-affirmation of Roe v. Wade, *see* note 22, supra, in Planned Parenthood of Southeastern Pa. v. Casey, *see* note 22, supra, and subsequent decisions in Gonzales v. Carhart, *see* note 22, supra, and Hellerstedt, supra.

COMBS, J., with whom Gurich, C.J., Kauger and Reif, JJ., join, concurring specially:

1. In *Roe*, the United States Supreme Court held a woman's right to an abortion was founded upon the protections provided under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. 410 U.S. 113, 164. The Fourteenth Amendment mandates all States shall comply with the Due Process Clause. The application of the Fourteenth Amendment's Due Process Clause is alive and well today. The most recent example is found in *Timbs v. Indiana*, No. 17-1091, 2019 WL 691578 (U.S. Feb. 20, 2019). In *Timbs*, the Supreme Court held the Fourteenth Amendment's Due Process Clause incorporates the protections found in the Eighth Amendment, *i.e.*, providing protections against excessive fines. 2019 WL 691578 at 6.

DARBY, V.C.J., DISSENTING:

1. *Malson v. Palmer Broad. Grp.*, 1997 OK 42, ¶ 11, 936 P.2d 940, 942; *see also* 12 O.S.2011, § 2056(C).

2. *Fargo v. Hays-Kuehn*, 2015 OK 56, ¶ 12, 352 P.3d 1223, 1227.

3. *Hargrave v. Can. Valley Elec. Coop.*, 1990 OK 43, ¶ 14, 792 P.2d 50, 55.

4. *Id.*; *Runyon v. Reid*, 1973 OK 25, ¶ 14, 510 P.2d 943, 946.

5. *Tiger v. Verdigris Valley Elec. Coop.*, 2016 OK 74, ¶ 13, 410 P.3d 1007, 1011.

6. R. for Dist. Cts. of Okla. 13(b), 12 O.S.2011, ch.2, app.

7. Nova disputed the admissibility of the State's expert's affidavit. The district court struck portions, leaving substantial evidence to support the State's disputed material facts.

8. R. for Dist. Cts. of Okla. 13(b), 12 O.S.2011, ch.2, app.

9. Pls.' Reply in Supp. of Cross Mot. for Summ. J. at 1, *Okla. Coal. for Reprod. J. v. Cline,* No. CV-2014-1886 (Okla. Cty. Dist. Ct.) (emphasis added).

10. *See Loper,* 1979 OK 84, ¶ 7, 596 P.2d at 546.

11. Tr. of Proc. Aug. 25, 2017, *Okla. Coal. for Reprod. J. v. Cline*, No. CV-2014-1886 (Okla. Cty. Dist. Ct.).

12. R. for Dist. Cts. of Okla. 13(e), 12 O.S.2011, ch.2, app.

13. *Lowery v. Echostar Satellite Corp.*, 2007 OK 38, ¶ 11, 160 P.3d 959, 963-64.

14. *Id*. ¶ 11, 160 P.3d at 963.

15. *Whole Women's Health v. Hellerstedt*, 136 S.Ct. 2292, 2309-10, 195 L.Ed.2d 665 (2016); *Gonzales v. Carhart*, 550 U.S. 124, 146, 158, 127 S.Ct. 1610, 1626-27, 1633, 167 L.Ed.2d 480 (2007); *Planned Parenthood of Se. Penn. v. Casey,* 505 U.S. 833, 846, 874, 877, 895, 112 S.Ct. 2791, 2804, 2819, 2820, 2830, 120 L.Ed.2d 674 (1992).

2019 OK 34

IN THE MATTER OF: A.A., an Adjudicated Deprived Child. DEMETRIUS ANDERSON, Appellant, v. STATE OF OKLAHOMA, Appellee.

No. 117,110. April 30, 2019

MEMORANDUM OPINION

DARBY, V.C.J.:

¶1 The question presented to this Court is whether the State presented clear and convincing evidence to support termination of the parental rights of Demetrius Anderson (Father). We answer in the affirmative.

I. BACKGROUND AND PROCEDURAL HISTORY

¶2 A.A. (Child) was born in August 2014. Father was present in the hospital on the day of her birth. At that time, Child and Mother tested positive for phencyclidine (PCP). The Oklahoma Department of Human Services (DHS) was notified, and the case was referred to Family Centered Services. Mother entered a residential drug treatment facility, and Child was temporarily placed with a friend until Child later joined Mother at the facility. Shortly after completing treatment, Mother tested positive for PCP and marijuana. In June 2015, when Child was nine (9) months old, DHS removed Child from Mother's home and two (2) months later placed Child with her current kinship foster parent.[1] During that time, Father was incarcerated.

¶3 On June 22, 2015, the State filed a petition in Oklahoma County District Court requesting the court adjudicate Child deprived, as to Father, due to a lack of proper parental care and guardianship and because Father's home was unfit due to substance abuse, extensive criminal activity, and failure to protect.[2] On June 13, 2016, Father stipulated to the allegations of the petition and agreed that the *conditions to correct were "possessing/using illegal drugs/addiction," failure to protect, incarceration due to criminal activity, and lack of proper parental care and guardianship*. That day, the district court accepted Father's stipulation, adjudicated Child deprived as to him, and approved Father's individualized service plan (ISP).

¶4 Father failed to attend the next permanency hearing on September 26, 2016, because he was in Oklahoma County jail. Father was released from jail on October 1st and shortly thereafter met with DHS, which referred Father for services consistent with his ISP. Due to no fault of his own, Father was unable to begin services until January 2017. After terminating Mother's parental rights on January 30th, the court reminded Father to be diligent, as he was the only remaining parent in the case. In response, Father was mostly consistent in following his ISP for the next three (3) months, participating in parenting and substance abuse classes and testing negative for drugs.

¶5 Based on that progress, on April 24, 2017, the district court granted Father unsupervised visitation with Child and scheduled the first unsupervised visit to occur the following day. Father, however, abandoned that opportunity and instead was arrested for stabbing a man in the chest with a knife, cutting his heart. Upon his arrest, Father was found to be carrying six (6) individually wrapped bags of marijuana. After he was released on bond on May 20, 2017, Father met with DHS on May 26th to discuss reengaging in services and scheduling visitation. On June 6, 2017, Father had a supervised visit with Child but chose not to schedule further visits due to the uncertainty of his schedule. On June 9, 2017, DHS submitted referrals for Father to resume work on his ISP. Father never contacted DHS again.

¶6 On July 24, 2017, Father appeared at the permanency hearing only long enough to be notified of the next court date in August. On July 27th, the State filed an amended petition seeking to terminate Father's parental rights, pursuant to title 10A, section 1-4-904(B)(5) of the Oklahoma Statutes, for failure to correct conditions. 2d Am. Pet. at 3, *In re A.A.*, No. JD-2015-245 (Okla. Cty. Dist. Ct.). Despite having been notified in court of the August hearing date, Father failed to appear at that permanency hearing where the district court found reasonable efforts to reunite had been made, and then changed the permanency plan to adoption. Because neither the State nor his attorney could locate him, Father also failed to attend the next hearing in September. At the November 2017 permanency hearing, Father was brought from Oklahoma County jail and was personally served in court with the amended petition to terminate his parental rights.

¶7 Regarding his pending criminal charges, Father pled guilty in January 2018 to Assault & Battery with a Dangerous Weapon and Possession of a CDS with Intent to Distribute (Marijuana).[3] The court sentenced Father to ten (10) years on each count, to be served concurrently with each other and with three (3) prior sentences.[4]

¶8 On May 8 and 9, 2018, the Oklahoma County District Court held a jury trial on the termination of Father's parental rights. The State presented testimony from Father, three DHS workers, the foster mother, and the court appointed special advocate. Father, via phone from the penitentiary, testified that he did not believe he currently had a substance abuse problem or a problem staying away from criminal activity. Father characterized the stabbing as an act of self-defense during an argument between friends that got out of hand, and he explained

that on reflection, he chose poorly how to best defend himself. Father revealed that after his release on bond he missed a court date for his criminal case, resulting in issuance of an arrest warrant. Father testified that he turned himself in approximately thirty (30) days after the warrant was issued, but asserted the warrant was the reason he was absent from Child's court dates.

¶9 In his testimony, Father agreed that it was unfair for Child to have to wait for his release from prison, but he stated that he also thought it would be unfair if he did not receive another opportunity to correct conditions. Father further testified that he was currently participating in a step-down program, which would move him to a halfway house by the end of the year and allow early release within three (3) to five (5) years based on good behavior. Father admitted that *he did not try to call or visit Child or DHS from June to November 2017,* even though he was released on bond during that time.

¶10 Father's second DHS case worker testified that he advocated for Father to be granted unsupervised visits with Child. He also contacted Father after the April arrest and attempted to get him working on his ISP again. He testified that despite Father's lack of effort to correct conditions or even to contact Child after June 2017, DHS was still willing to resume visitation, engage in services, and pick up where Father left off. He further testified that based on Father's actions, it was clear that he *could* succeed, but that he was choosing not to.

¶11 The case worker who took over shortly after Father's arrest testified that he was unable to even locate Father after his release on bond and that Father never made any effort to contact DHS or Child, before or after the State filed the petition to terminate. He further testified that the active warrant did not matter to DHS; rather had Father made any contact, he would have assisted Father and made additional referrals for him. He further explained that he never had the opportunity to supervise visitation or make referrals for Father. He also testified that he believed it was in Child's best interests to terminate Father's parental rights due to Father's failure to engage in services, the instability of foster care, Child's need for permanency, and Father's prison sentences – which would not allow him to correct conditions for several years.

¶12 The State presented evidence that despite Father's testimony regarding a potential early release, Father had a history of bad behavior while incarcerated – such as placing bodily fluids on a government employee, escaping from penitentiary (from a halfway house), and *in November 2017, having opiates in his possession while in county jail*. Multiple DHS workers testified that upon release to a halfway house, Father would be able to begin visitation with Child, but that Father would not be able to begin correcting conditions until after release from the halfway house. The foster mother testified that over the entire history of the case, Father had only called Child one (1) time. Several DHS workers and the special advocate testified as to the importance of stability for Child and about Father's apparent lack of interest in doing the work to be a parent, as evidenced by his unwillingness to even call Child.

¶13 On May 9, 2018, the jury unanimously voted to terminate Father's parental rights to Child under sections 1-4-904(A) and (B)(5). The district court accepted the jury's verdict and filed a journal entry of judgment terminating Father's parental rights on May 14, 2018. Father appealed, arguing that the district court committed reversible error in sustaining the State's motion to terminate because the ruling was not supported by clear and convincing evidence that Father failed to correct conditions or that termination was in Child's best interests. This Court retained the appeal.

II. ANALYSIS

¶14 In a parental termination case, the State bears the burden to show by clear and convincing evidence that the requirements of section 1-4-904 have been met and the child's best interests are served by the termination of parental rights. *In re C.M.*, 2018 OK 93, ¶ 19, 432 P.3d 763, 768; *In re J.L.O.*, 2018 OK 77, ¶ 29, 428 P.3d 881, 890. Clear and convincing evidence produces a firm belief or conviction as to the truth of the allegation in the mind of the trier of fact. *In re C.M.*, 2018 OK 93, ¶ 19, 432 P.3d at 768. We review a termination of parental rights *de novo. Id*.

¶15 Father alleges that the State failed to prove by clear and convincing evidence that (1) he failed to correct conditions and (2) termination of his parental rights was in the best interests of Child. The district court terminated Father's parental rights under title 10A, sections 1-4-904(A) and (B)(5). Those sections provide:

A. A court shall not terminate the rights of a parent to a child unless:

1. The child has been adjudicated to be deprived either prior to or concurrently with a proceeding to terminate parental rights; and

2. Termination of parental rights is in the best interests of the child.

B. The court may terminate the rights of a parent to a child based upon the following legal grounds:

. . . .

5. A finding that:

a. the parent has failed to correct the condition which led to the deprived adjudication of the child, and

b. the parent has been given at least three (3) months to correct the condition . . . .

10A O.S.Supp.2015, § 1-4-904(A), (B)(5).

1. Failure to Correct Conditions

¶16 Under section 1-4-904(B)(5), the State must prove the parent failed to correct the condition that led to the child being adjudicated deprived and that he had been given at least three (3) months to correct that condition. At the time of trial, Father had been given almost two (2) years to correct the conditions that led to Child being adjudicated deprived, namely lack of proper parental care and guardianship, failure to protect, possessing or using illegal drugs, and criminal activity. Father correctly argues that failure to comply with the ISP alone is not grounds for termination; failure to correct conditions that led to deprived adjudication, however, may lead to termination of parental rights. 10A O.S.Supp.2015, § 1-4-904(B)(5). Although Father set out to correct conditions at one point during the proceedings, he then committed additional criminal acts and failed to make any further efforts toward correcting conditions or working on his ISP.

¶17 Prior to his April 2017 arrest, Father maintained consistent living arrangements, completed parenting classes, attended all of the substance abuse classes, and provided almost all required urine screens with negative results. Father corrected conditions to the extent that the court granted unsupervised visitation. The very next day, however, he was arrested for possession of numerous bags of marijuana with intent to distribute and for stabbing a man in the chest with a knife.

¶18 After his release on bond and second DHS referral, Father did not reengage in services. Father's utter lack of participation in his ISP after that point led to his failure to correct conditions. Father did not make any attempt to visit or speak with Child or DHS in the eleven (11) months prior to jury trial. Father was on the lam for months, and DHS was unable to contact him at his residence or make contact with any family members who might know his location. Father failed to show up for additional urine screens, complete substance abuse counseling, or take the steps to be readmitted to the program after being dismissed for lack of attendance while in Oklahoma County jail. Father blamed his inaction on the outstanding arrest warrant and his desire to avoid arrest, yet at no point did he make the effort to communicate that information to DHS. Likewise, the thirty-day window that he claimed justified his absences did not cover all of the court dates he missed.

¶19 On appeal, Father argues that his negative urine screens show that he has corrected this condition and the few missed tests prior to his arrest are not evidence of further correction being required. Father seems to ignore that he was arrested for possession of marijuana with intent to distribute, and that after the State filed its petition to terminate, Father was also found with illegal drugs in his possession while in county jail. Father additionally argues that he had stable housing with his name on the lease. DHS was unable to locate him, however, there or at any other address after his release on bond. Further, after pleading guilty to the charges, Father attempted to shirk responsibility for his criminal actions at the jury trial for termination, describing the stabbing incident as self-defense. We find Father's continued inaction regarding Child, repeated possession of illegal substances, and new criminal convictions are clear and convincing evidence that Father has not corrected the conditions of lack of proper parental care and guardianship, failure to protect, possessing or using illegal drugs, and criminal activity.

2. Best Interests of the Child

¶20 Under title 10A, section 1-4-904(A), the State must prove by clear and convincing evidence (1) that the child was previously or concurrently adjudicated deprived and (2) that

termination is in the child's best interests. Consideration of best interests is paramount. *In re M.K.T.,* 2016 OK 4, ¶ 57, 368 P.3d 771, 788. Where reasonable efforts to return a deprived child to the parent are fruitless and result in prolonged foster care placement, extended State custody without progress toward reunification is so detrimental to the child's best interests as to justify termination of parental rights. *In re C.M.*, 2018 OK 93, ¶ 23, 432 P.3d at 769.

¶21 Father stipulated to the relevant conditions, and the court adjudicated Child deprived, as to him, almost two (2) years before the jury trial. The jury heard extensive testimony regarding the State's efforts, which enabled it to make an informed decision on whether termination was in the best interests of Child. Father testified that he had missed court dates due to the outstanding warrant for his arrest, but he failed to give any explanation for why he was incommunicado and did not call DHS or Child for almost a year before trial. The State presented evidence that Father made no effort to correct conditions during that same time, and DHS could not even locate Father for five (5) months before he returned to jail. In contrast, the jury heard evidence of the positive bond Child had with the foster placement and the serious psychological harm that would likely result if Child was removed from the foster family.

¶22 Father's last contact with Child occurred eleven (11) months before the jury trial on June 6, 2017, when Child was two-and-a-half (2 1/2) years old. He never scheduled another supervised visit and never called Child again. The jury heard evidence that Father had an extensive criminal history and would remain incarcerated for at least the remainder of the year. Father would not be fully released from a halfway house for at least three (3) years in order to begin correcting conditions. Under the best-case scenario, Child would be almost seven (7) when Father could restart working on his ISP. If Father did not exhibit model behavior, the time could be significantly extended. The jury also heard evidence of Father's prior misconduct in jail even after this termination proceeding began, evidence which countered the likelihood of best-case scenario timing. We find the State presented clear and convincing evidence that it is in Child's best interests to terminate Father's parental rights.

III. CONCLUSION

¶23 We find clear and convincing evidence that Father failed to correct the conditions that led to Child being adjudicated deprived as to him and that it was in Child's best interests to terminate Father's parental rights. Based on that evidence, the jury found that Child's best interests required the termination of Father's parental rights. We find the district court did not err in its judgment granting the State's petition to terminate Father's parental rights, and we hereby affirm. We remand to the district court for permanency proceedings.

Concur: Gurich, C.J., Darby, V.C.J., Kauger, Winchester, Edmondson, Colbert, Reif, Combs, JJ.

DARBY, V.C.J.:

1. Ultimately, the court terminated Mother's parental rights on January 30, 2017, after she relinquished her rights to Child.

2. The petition listed the specific allegations regarding Father and Child as follows:

> That [C]hild has not had the proper parental care and guardianship necessary for her physical safety and mental well-being;
> That the home of the Father is unfit due to failure to protect;
> That [C]hild was removed from the home of the Mother for the reasons stated above and the Father failed to protect [C]hild from said abuse and neglect;
> That the Father has an obligation to make reasonable inquiry into the conditions of [C]hild's place of residence and failed to take steps to protect [C]hild;
> That the Father has failed to establish paternity as to [C]hild;
> That the Father has failed to exercise his parental rights and responsibilities;
> That the Father has failed to maintain a significant parental relationship with [C]hild through non-incidental visitation or communication;
> That the Father has failed to provide financial support to the best of his ability;
> That the home of the Father is unfit due to extensive involvement in criminal activity;
> That the Father is currently incarcerated in an Oklahoma Department of Corrections facility;
> That the home of Father is unfit due to substance abuse;
> That the Father was convicted of Possession of Cocaine Base in Oklahoma County case number CF-2014-6358;
> That i[t] would be in the best interest of [C]hild that she be ADJUDICATED DEPRIVED and be made a ward of the Court.

Pet. at 2-3, *In re A.A.*, No. JD-2015-245 (Okla. Cty. Dist. Ct.).

3. *State v. Anderson*, No. CF-2017-2744 (Okla. Cty. Dist. Ct.).

4. *State v. Anderson*, No. CF-2012-1096 (Okla. Cty. Dist. Ct.); *State v. Anderson*, No. CF-2013-5956 (Okla. Cty. Dist. Ct.); and *State v. Anderson*, No. CF-2014-6358 (Okla. Cty. Dist. Ct.).

THE SOVEREIGNTY SYMPOSIUM XXXII

Treaties, Etc.

Presented by the Oklahoma Supreme Court and the Sovereignty Symposium, Inc.

June 5 - 6, 2019 | Skirvin Hilton Hotel | Oklahoma City, Oklahoma

Wednesday Morning

4.0 CLE credits / 0 ethics included

7:30 - 4:30 Registration

8:00 - 8:30 Complimentary Continental Breakfast

10:30 - 10:45 Morning Coffee / Tea Break

12:00 - 1:15 Lunch on your own

8:30 - 11:45 PANEL A: ECONOMIC FUTURES | CRYSTAL ROOM

CO-MODERATOR: JAMES COLLARD, Director of Planning and Economic Development, Citizen Potawatomi Nation

CO-MODERATOR: LISA BILLY, (*Chickasaw*), Oklahoma Secretary of Native American Affairs

MATT PINNELL, Lieutenant Governor of Oklahoma

KAREN BELL, British Consul General, Houston

KAY RHOADS, (*Sac and Fox*), Chief of the Sac and Fox Nation

MELOYDE BLANCETT, Oklahoma House of Representatives, District 78

LESLIE OSBORN, Oklahoma State Labor Commissioner

JOHN BUDD, Chief Operating Officer for Oklahoma

REGGIE WASSANA, (*Cheyenne and Arapaho*), Governor, Cheyenne and Arapaho Tribes of Oklahoma

JOY HOFMEISTER, Oklahoma Superintendent of Public Instruction

DANA MURPHY, Chair, Oklahoma Corporation Commission

TERRY NEESE, Institute for the Economic Empowerment of Women

The Sovereignty Symposium was established to provide a forum in which ideas concerning common legal issues could be exchanged in a scholarly, non-adversarial environment. The Supreme Court espouses no view on any of the issues, and the positions taken by the participants are not endorsed by the Supreme Court.

Artwork: Poteet Victory, The Night Guardian; Joseph French Photography

8:30 - 11:45 PANEL B: SIGNS, SYMBOLS AND SOUNDS | GRAND BALLROOMS A-C

(THIS PANEL CONTINUES FROM 3:00 - 6:00)

CO-MODERATOR: JAY SCAMBLER, Collector of Native American Art

CO-MODERATOR: ERIC TIPPECONNIC, (*Comanche*), Artist and Professor, California State University, Fullerton

WILLIAM DAVIS, (*Muscogee* (*Creek*)), Singer

KELLY HANEY, (*Seminole*), Artist, Former Oklahoma State Senator, former Principal Chief of the Seminole Nation

JERI REDCORN, (*Caddo/Potawatomi*), Potter

VANESSA JENNINGS, (*Kiowa/Gila River Pima*), Artist

LES BERRYHILL, (*Yuchi/Muscogee*), Artist

HARVEY PRATT, (*Cheyenne/Arapaho*), Peace Chief, Artist, Designer of the Smithsonian's National Native American Veterans Memorial

GORDON YELLOWMAN, (*Cheyenne*), Peace Chief, Assistant Executive Director of Education, Cheyenne and Arapaho Tribes

POTEET VICTORY, (*Cherokee/Choctaw*), Artist, 2019 Symposium Poster

CHRIS MORRISS, Oklahoma State Protocol Officer

GREGORY H. BIGLER, (*Euchee*), District Judge, Muskogee (Creek) Nation

8:30 - 11:45 PANEL C: SPIRITUAL TRADITIONS | CENTENNIAL 1-2

MODERATOR: NOMA GURICH, Chief Justice, Oklahoma Supreme Court

KRIS LADUSAU, Reverend, Dharma Center of Oklahoma

ROBERT HAYES JR., Bishop, United Methodist Church, Retired

ELIZABETH KERR, Special Judge, Oklahoma County

LINDSAY ROBERTSON, Faculty Director, Center for the Study of American Indian Law and Policy, Professor, University of Oklahoma

GORDON YELLOWMAN, (*Cheyenne*), Peace Chief, Assistant Executive Director of Education, Cheyenne and Arapaho Tribes

BRADFORD MORSE, Dean of Law, Thompson Rivers University

ROBERT JOSEPH, (*Maori*), Senior Lecturer, Research Centre Director MIG (Law), The University of Waikato

11:45 LUNCHEON HONORING TRIBAL LEADERS AND FACULTY | VENETIAN ROOM

MASTER OF CEREMONIES: NOMA GURICH, Chief Justice, Oklahoma Supreme Court

PRAYER: WILLIAM WANTLAND, (*Seminole, Chickasaw and Choctaw*), Episcopal Bishop of Eau Claire, Retired

GREETING: EMMA NICHOLSON, BARONESS NICHOLSON OF WINTERBOURNE, HOUSE OF LORDS

Wednesday Afternoon

4 CLE credits / 0 ethics included

7:30 - 4:30 Registration

2:45 - 3:00 Tea / Cookie Break for All Panels

6:00 Mini Reception in Honor of the Flute Circle

1:10 CAMP CALL: GORDON YELLOWMAN,

(*Cheyenne*), Peace Chief, Assistant Executive Director of Education, Cheyenne and Arapaho Tribes

1:15 - 2:45 OPENING CEREMONY AND KEYNOTE ADDRESS | GRAND BALLROOMS D-F

MASTER OF CEREMONIES: STEVEN TAYLOR, Justice, Oklahoma Supreme Court, Retired

PRESENTATION OF FLAGS

HONOR GUARD: KIOWA BLACK LEGGINGS SOCIETY

SINGERS: SOUTHERN NATION

INVOCATION: KRIS LADUSAU, Reverend, Dharma Center of Oklahoma

INTRODUCTION OF KEYNOTE SPEAKER: KAREN BELL, British Consul General, Houston

SPEAKER: EMMA NICHOLSON, BARONESS NICHOLSON OF WINTERBOURNE, House of Lords

WELCOME: NOMA GURICH, Chief Justice, Oklahoma Supreme Court

WELCOME: KEVIN STITT, (*Cherokee*), Governor of Oklahoma

WELCOME: DAVID HOLT, (*Osage*), Mayor, Oklahoma City, Oklahoma

WELCOME: CHARLES CHESNUT, President, Oklahoma Bar Association

PRESENTATION OF AWARDS: YVONNE KAUGER, Justice, Oklahoma Supreme Court

HONOR AND MEMORIAL SONGS: SOUTHERN NATION

CLOSING PRAYER: ROBERT HAYES JR., Bishop, United Methodist Church, Retired

3:00 - 6:00 PANEL A: INTERTWINED INTERNATIONAL INDIGENOUS ECONOMIC INTERESTS | CRYSTAL ROOM

CO-MODERATOR: WAYNE GARNONS-WILLIAMS, Senior Lawyer and Principal Director, Garwill Law Professional Corporation, Chair, International Intertribal Trade and Investment Organization

CO-MODERATOR: RODGER RANDLE, Director, Center for Studies in Democracy and Culture and Professor, University of Oklahoma

RICHARD HYDE, British Consul General Designate, Houston

ROBERT JOSEPH, (*Maori*), Senior Lecturer, Research Centre Director MIG (Law), The University of Waikato

BRADFORD MORSE, Dean of Law, Thompson Rivers University

BINA SENGAR, Assistant Professor, Department of History and Ancient Indian Culture, School of Social Sciences, Dr. Babasaheb Ambedkar Marathwada University

RICO BUCHLI, Honorary Consul, Switzerland
ENRIQUE VILLAR-GAMBETTA, Honorary Consul, Peru
JAMES COLLARD, Director of Planning and Economic Development, Citizen Potawatomi Nation

3:00 - 6:00 PANEL B: SIGNS, SYMBOLS AND SOUNDS | GRAND BALLROOMS A-C

CO-MODERATOR: JAY SCAMBLER, Collector of Native American Art
CO-MODERATOR: ERIC TIPPECONNIC, (*Comanche*), Artist and Professor, California State University, Fullerton

CHAD SMITH, (*Cherokee*), Attorney
KENNETH JOHNSON, (*Muscogee/Seminole*), Contemporary Jewelry Designer and Metalsmith
JAMES PEPPER HENRY, (*Kaw/Muscogee* (*Creek*)), Director and Chief Operating Officer, American Indian Cultural Center Foundation
JIM VAN DEMAN, (*Delaware*), Artist and former Vice-Chief of the Delaware Nation
KELLY LEWIS, Talk Jive Radio
THOMAS WARE, Talk Jive Radio
JEROD IMPICHCHAACHAAHA' TATE, (*Chickasaw*), Composer
TIMOTHY TATE NEVAQUAYA, (*Comanche*), Artist and Musician
BRENT GREENWOOD, (*Chickasaw/Ponca*), Artist and Southern Nation Singer

3:00 - 6:00 PANEL C: CRIMINAL LAW | CENTENNIAL 1-2

CO-MODERATOR: DANA KUEHN, (*Choctaw*), Vice-Presiding Judge, Oklahoma Court of Criminal Appeals
CO-MODERATOR: ARVO MIKKANEN, (*Kiowa/Comanche*) Assistant United States Attorney and Tribal Liaison, Western District of Oklahoma

TRENT SHORES, United States Attorney for the Northern District of Oklahoma
COLLEEN SUCHE, Judge of the Manitoba Court of Queen's Bench
MIKE HUNTER, Attorney General of Oklahoma
ROBERT RAVITZ, Chief Public Defender, Oklahoma County
JOHN CANNON, Attorney The Cannon Law Firm
STEVE MULLINS, Attorney, Lyle, Soule and Curlee
CALLANDRA MCCOOL, (*Citizen Potawatomi*), Research Editor, American Indian Law Review, University of Oklahoma College of Law

WEDNESDAY PROGRAMS WILL CONCLUDE WITH A FLUTE CIRCLE IN GRAND BALLROOM A-C. PLEASE BRING YOUR FLUTE TO PARTICIPATE IN THIS EVENT.

6:00 MINI RECEPTION IN HONOR OF THE FLUTE CIRCLE | HALLWAY OUTSIDE OF GRAND BALLROOMS A-C

Thursday Morning

4.0 CLE credits / 2 ethics included
7:30 - 4:30 Registration
8:00 - 8:30 Complimentary Continental Breakfast
10:30 - 10:45 Morning Coffee / Tea Break
12:00 - 1:15 Lunch on your own

8:30 - 12:00 PANEL A: JUVENILE LAW AND CHILDREN'S ISSUES | GRAND BALLROOMS A-B

CO-MODERATOR: DEBORAH BARNES, Vice Presiding Judge, Oklahoma Court of Civil Appeals, Division Two
CO-MODERATOR: MIKE WARREN, Associate District Judge, Harmon County, Oklahoma

STEVE HAGER, Director of Litigation, Oklahoma Indian Legal Services
RICHARD KIRBY, Associate District Judge, Oklahoma County
ALAN WELCH, Special Judge, Oklahoma County
GREGORY RYAN, Special Judge, Oklahoma County
PHIL LUJAN, (*Kiowa/Taos Pueblo*), Judge of the Seminole and Citizen Potawatomi Nations
JACK TROPE, Senior Director, Casey Family Programs
DORIS FRANSEIN, District Judge, Tulsa County, Retired

8:30 - 12:00 BEYOND CONSERVATION: PREPARING FOR THE FUTURE AND THE FOODS OF THE LAND | GRAND BALLROOMS D-F

CO-MODERATOR: PATRICK WYRICK, District Judge, United States District Court for the Western District of Oklahoma
CO-MODERATOR: JANIE HIPP, (*Chickasaw*), CEO, Native American Agriculture Fund

BLAKE JACKSON, (*Choctaw*), Policy Officer/Staff Attorney at Indigenous Food and Agriculture Initiative, University of Arkansas
BLAYNE ARTHUR, Secretary and Commissioner of Agriculture, Oklahoma
JOHN BERREY, Chairman, Quapaw Nation
JERRY MCPEAK, (*Muscogee* (*Creek*)), Former Oklahoma State Legislator
JOHN HARGRAVE, Attorney
NATHAN HART, (*Cheyenne*), Executive Director, Department of Business, Cheyenne and Arapaho Tribes
VINCE LOGAN, (*Osage*), CFO/CIO, Native American Agriculture Fund
ANOLI BILLY, (*Chickasaw*), Representing the Voices of Next Generation Food Producers
JULIE CUNNINGHAM, Executive Director, Oklahoma Water Resources Board

8:30 - 9:30 PANEL C: ETHICS | CENTENNIAL 1-3

MODERATOR: JOHN REIF, Justice, Oklahoma Supreme Court, Retired

FOLLOWED BY A DISCUSSION OF THE CONCERNS OF STATE, FEDERAL AND TRIBAL JUDGES MODERATED BY JUSTICE REIF

JOHN TAHSUDA, Principal Deputy Assistant Secretary of Indian Affairs
SUZANNE MITCHELL, Magistrate, United States District Court for the Western District of Oklahoma
WILLIAM HETHERINGTON, Judge, Oklahoma Court of Civil Appeals, Retired
RICHARD OGDEN, District Judge, Oklahoma County
ALETIA HAYNES TIMMONS, (*Cherokee*), District Judge, Oklahoma County
CARLA PRATT, Dean, Washburn University School of Law
GREGORY D. SMITH, Justice, Pawnee Nation Supreme Court
ELIZABETH BROWN, (*Cherokee*), Associate District Judge, Adair County
BRENDA PIPESTEM (*Eastern Band of Cherokee Indians***),** Associate Justice, Eastern Band of Cherokee Indian Supreme Court
MIKE KISS, MIS Interim Director, Administrative Office of the Courts

8:30 - 12:00 PANEL D: TREATIES | CRYSTAL ROOM

MODERATOR: BOB BLACKBURN, Executive Director, Oklahoma Historical Society

JAY HANNAH, Executive Vice-President of Financial Services, BancFirst
LINDSAY ROBERTSON, Faculty Director, Center for the Study of American Indian Law and Policy, Professor, University of Oklahoma
LEE LEVY, Former AFSC Commander
ROBERT MILLER, Professor of Law, Arizona State University, Sandra Day O›Connor College of Law
KELLY CHAVES, Professor of History and Director of Fine Arts, Oklahoma School of Science and Mathematics

Thursday Afternoon

4.5 CLE credits / 0 ethics included

3:30 - 3:45 Tea / Cookie Break for All Panels

12:00 - 1:30 WORKING LUNCH FOR FEDERAL, STATE AND TRIBAL JUDICIARY | CENTENNIAL 1-3

FACILITATOR: DOUGLAS COMBS, (*Muscogee* (*Creek*)), Justice, Oklahoma Supreme Court

1:30 - 5:30 PANEL A: JUVENILE LAW | GRAND BALLROOMS A-B

CO-MODERATOR: DEBORAH BARNES, Vice Presiding Judge, Oklahoma Court of Civil Appeals, Division Two
CO-MODERATOR: MIKE WARREN, Associate District Judge, Harmon County, Oklahoma
ELIZABETH BROWN, (*Cherokee*), Associate District Judge, Adair County, Oklahoma
STEVEN BUCK, Executive Director, Oklahoma Office of Juvenile Affairs
JARI ASKINS, Administrative Director of the Courts
JOE DORMAN, Oklahoma Institute for Child Advocacy
NIKKI BAKER LIMORE, (*Cherokee*), Executive Director, Child Welfare, Cherokee Nation
NORMAN RUSSELL, Associate District Judge, Kiowa County, Retired

1:30 - 5:30 PANEL B: GAMING | GRAND BALLROOMS D-F

CO-MODERATOR: NANCY GREEN, ESQ., (*Choctaw*), Green Law Firm, P.C., Ada, Oklahoma
CO-MODERATOR: MATTHEW MORGAN, (*Chickasaw*), Director of Gaming Affairs, Division of Commerce, Chickasaw Nation

ERNIE STEVENS, (*Oneida*), Chairman, National Indian Gaming Association
JONODEV CHAUDHURI, (*Muscogee* (*Creek*)), Chairman, National Indian Gaming Commission
KATHRYN ISOM-CLAUSE, (*Taos Pueblo*) Vice Chair, National Indian Gaming Commission
MIKE MCBRIDE, III, Crowe and Dunlevy
GRAYDON LUTHEY, JR., Gable Gotwals
WILLIAM NORMAN, JR., (*Muscogee* (*Creek*)), Hobbs, Straus, Dean and Walker
ELIZABETH HOMER, (*Osage*), Homer Law
SHEILA MORAGO, (*Gila River Indian Community*), Executive Director, Oklahoma Indian Gaming Association
KYLE DEAN, Associate Professor of Economics, Director of Center for Native American & Urban Studies, Oklahoma City University
TRACY BURRIS, (*Chickasaw*), Executive Director, Muscogee (Creek), Nation Office of Public Gaming

1:30 - 5:30 PANEL C: ECONOMIC FUTURES | CRYSTAL ROOM

CO-MODERATOR: JAMES COLLARD, Director of Planning and Economic Development, Citizen Potawatomi Nation
CO-MODERATOR: LISA BILLY, (*Chickasaw*), Oklahoma Secretary of Native American Affairs

BILL LANCE, Secretary of Commerce, Chickasaw Nation
TIM GATZ, Executive Director, Oklahoma Department of Transportation and the Oklahoma Turnpike Authority
SEAN KOUPLEN, Oklahoma Secretary of Commerce and Workforce Development
CHRIS BENGE, Executive Director, Center for Rural and Tribal Health, Oklahoma State University
TAMMYE GWIN, Senior Director of Business Development, Choctaw Nation of Oklahoma
DEREK OSBORN, Tulsa Field Office Director for Senator James Lankford

This agenda is subject to revision.

NOTICE

There will be a working lunch for State, Tribal and Federal Judges to be held at 12 noon on June 6, 2019.

A panel on the mutual concerns of State, Tribal and Federal Judges will be held beginning at 9:30 on June 6, 2019.

The Sovereignty Symposium XXXII

June 5 - 6, 2019
Skirvin Hilton Hotel
Oklahoma City, Oklahoma

Name: _____ Occupation: _____

Address: _____

City: _____ State _____ Zip Code _____

Billing Address (if different from above) _____

City: _____ State _____ Zip Code _____

Nametag should read: _____

Other: _____

Email address: _____

Telephone: Office _____ Cell _____ Fax _____

Tribal affiliation if applicable: _____

Bar Association Member: Bar # _____ State _____

16.5 hours of CLE credit for lawyers will be awarded, including 2.0 hours of ethics. **NOTE:** Please be aware that each state has its own rules and regulations, including the definition of "CLE;" therefore, certain portions of the program may not receive credit in some states.

# of Persons		Registration Fee	Amount Enclosed
_____	Both Days	$275.00 *($300.00 if postmarked after May 21, 2019)*	_____
_____	June 6, 2019 only	$175.00 *($200.00 if postmarked after May 21, 2019)*	_____
		Total Amount	_____

We ask that you register online at **www.thesovereigntysymposium.com**. This site also provides hotel registration information and a detailed agenda. For hotel registration please contact the Skirvin-Hilton Hotel at 1-405-272-3040. If you wish to register by paper, please mail this form to:

THE SOVEREIGNTY SYMPOSIUM, INC. The Oklahoma Judicial Center, Suite 1 2100 North Lincoln Boulevard Oklahoma City, Oklahoma 73105-4914

Presented By THE OKLAHOMA SUPREME COURT and THE SOVEREIGNTY SYMPOSIUM

Calendar of Events

May

7 **OBA Government and Administrative Law Section meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Melissa L. Blanton 405-521-6600

10 **OBA Estate Planning, Probate and Trust Section meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact A. Daniel Woska 405-657-2271

14 **OBA Legislative Monitoring Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Angela Ailles Bahm 405-475-9707

15 **OBA Family Law Section meeting;** 11:30 a.m.; Oklahoma Bar Center, Oklahoma City with video-conference; Contact Amy E. Page 918-208-0129

OBA Indian Law Section meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City with tele-conference; Contact Wilda Wahpepah 405-321-2027

16 **OBA Diversity Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with tele-conference; Contact Telana McCullough 405-267-0672

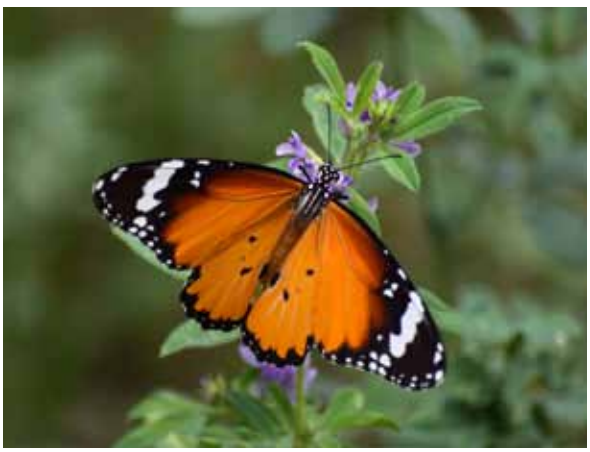
17 **OBA Board of Governors meeting;** 10 a.m.; Oklahoma Bar Center, Oklahoma City; Contact John Morris Williams 405-416-7000

OBA Lawyers Helping Lawyers Assistance Program Committee meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Hugh E. Hood 918-747-4357 or Jeanne Snider 405-366-5466

OBA Juvenile Law Section meeting; 3:30 p.m.; Oklahoma Bar Center, Oklahoma City with video-conference; Contact Tsinena Thompson 405-232-4453

18 **OBA Young Lawyers Division meeting;** 10 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Brandi Nowakowski 405-275-0700

21 **OBA Bench and Bar Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact David B. Lewis 405-556-9611 or David Swank 405-325-5254



22 **OBA Immigration Law Section meeting;** 11:00 a.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Lorena Rivas 918-585-1107

23 **OBA Professionalism Committee meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Linda G. Scoggins 405-319-3510

27 **OBA Closed** – Memorial Day

28 **OBA Access to Justice Committee meeting;** 11:30 a.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Rod Ring 405-325-3702

31 **OBA Professional Responsibility Commission meeting;** 9:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Gina Hendryx 405-416-7007

June

4 **OBA Government and Administrative Law Section meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Melissa L. Blanton 405-521-6600

6 **OBA Lawyers Helping Lawyers Discussion Group;** 6 p.m.; Office of Tom Cummings, 701 NW 13th St., Oklahoma City, OK 73012; RSVP to Jeanie Jones 405-840-0231

7 **OBA Alternative Dispute Resolution Section meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Clifford R. Magee 918-747-1747

Judicial Nominating Commission Elections: Nomination Period Opens

THE SELECTION OF qualified persons for appointment to the judiciary is of the utmost importance to the administration of justice in this state. Since the adoption of Article 7-B to the Oklahoma Constitution in 1967, there has been significant improvement in the quality of the appointments to the bench. Originally, the Judicial Nominating Commission was involved in the nomination of justices of the Supreme Court and judges of the Court of Criminal Appeals. Since the adoption of the amendment, the Legislature added the requirement that vacancies in all judgeships, appellate and trial, be filled by appointment of the governor from nominees submitted by the Judicial Nominating Commission.

The commission is composed of 15 members. There are six non-lawyers appointed by the governor, six lawyers elected by members of the bar, and three at large members, one selected by the Speaker of the House of Representatives; one selected by the President Pro Tempore of the Senate; and one selected by not less than eight members of the commission. All serve six-year terms, except the members at large who serve two-year terms. Members may not succeed themselves on the commission.

The lawyer members are elected from each of the six congressional districts as they existed in 1967. (As you know, the congressional districts were redrawn in 2011.) Elections are held each odd-numbered year for members from two districts.

2019 ELECTIONS

This year there will be elections for members in Districts 3 and 4. District 3 is composed of 22 counties in the south and southeastern part of the state. District 4 is composed of 12 counties in the central and the southwestern part of the state, plus a portion of eastern Oklahoma County. (See the sidebar for the complete list.)

Lawyers desiring to be candidates for the Judicial Nominating Commission positions have until Friday, May 17, 2019, at 5 p.m. to submit their Nominating Petitions. Members can download petition forms at www.okbar.org/jnc. Ballots will be mailed on June 7, 2019, and must be returned by June 21, 2019, at 5 p.m.

It is important to the administration of justice that the OBA members in the Third and Fourth Congressional Districts become informed on the candidates for the Judicial Nominating Commission and cast their vote. The framers of the constitutional amendment entrusted to the lawyers the responsibility of electing qualified people to serve on the commission.

OBA PROCEDURES GOVERNING THE ELECTION OF LAWYER MEMBERS TO THE JUDICIAL NOMINATING COMMISSION

1. Article 7-B, Section 3, of the Oklahoma Constitution requires elections be held in each odd numbered year by active members of the Oklahoma Bar Association to elect two members of the Judicial Nominating Commission for six-year terms from Congressional Districts as such districts existed at the date of adoption of Article 7-B of the Oklahoma Constitution (1967).

2. Ten (10) active members of the association, within the Congressional District from which a member of the commission is to be elected, shall file with the Executive Director a signed petition (which may be in parts) nominating a candidate for the commission; or, one or more County Bar Associations within said Congressional District may file with the Executive Director a nominating resolution nominating such a candidate for the commission.

3. Nominating petitions must be received at the Bar Center by 5 p.m. on the third Friday in May.

4. All candidates shall be advised of their nominations, and unless they indicate they do not desire to serve on the commission, their name shall be placed on the ballot.

5. If no candidates are nominated for any Congressional District, the

Board of Governors shall select at least two candidates to stand for election to such office.

6. Under the supervision of the Executive Director, or his designee, ballots shall be mailed to every active member of the association in the respective Congressional District on the first Friday in June, and all ballots must be received at the Bar Center by 5 p.m. on the third Friday in June.

7. Under the supervision of the Executive Director, or his designee, the ballots shall be opened, tabulated and certified at 9 a.m. on the Monday following the third Friday of June.

8. Unless one candidate receives at least 40 percent of the votes cast, there shall be a runoff election between the two candidates receiving the highest number of votes.

9. In case a runoff election is necessary in any Congressional District, runoff ballots shall be mailed, under the supervision of the Executive Director, or his designee, to every active member of the association therein on the fourth Friday in June, and all runoff ballots must be received at the Bar Center by 5 p.m. on the third Friday in July.

10. Under the supervision of the Executive Director, or his designee, the runoff ballots shall be opened, tabulated and certified at 9 a.m. on the Monday following the third Friday in July.

11. Those elected shall be immediately notified, and their function certified to the Secretary of State by the President of the Oklahoma Bar Association, attested by the Executive Director.

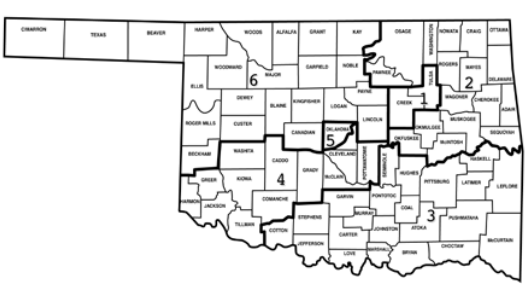
12. The Executive Director, or his designee, shall take possession of and destroy any ballots printed and unused.

13. The election procedures, with the specific dates included, shall be published in the *Oklahoma Bar Journal* in the three issues immediately preceding the date for filing nominating resolutions.

NOTICE

Judicial Nominating Commission Elections Congressional Districts 3 And 4

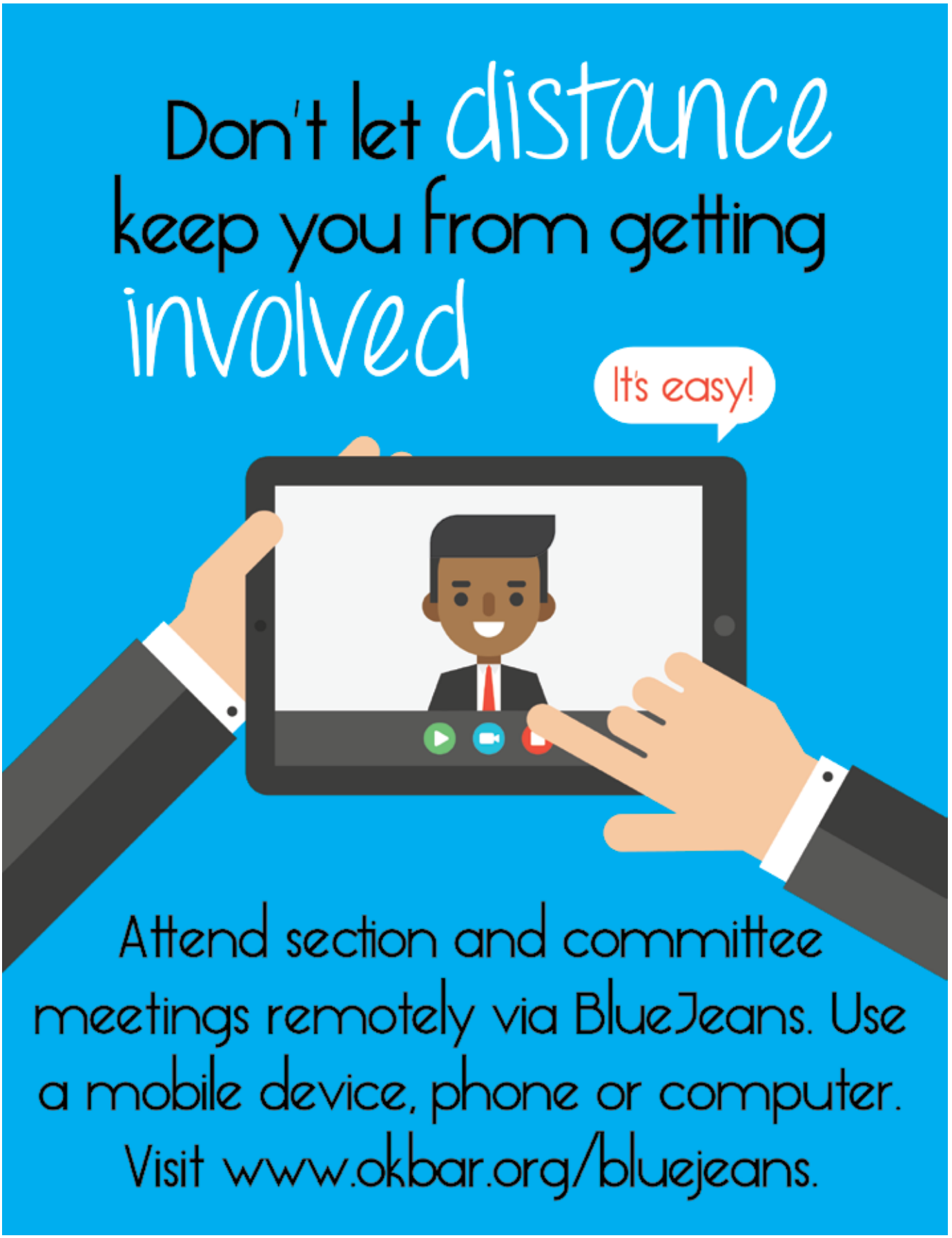
Nominations for election as members of the Judicial Nominating Commission from Congressional Districts 3 and 4 (as they existed in 1967) will be accepted by the Executive Director until 5 p.m., Friday, May 17, 2019. Ballots will be mailed June 7, 2019, and must be returned by 5 p.m. on June 21, 2019.



District No. 3
Atoka
Bryan
Carter
Choctaw
Coal
Cotton
Garvin
Haskell
Hughes
Jefferson
Johnston
Latimer
LeFlore
Love
Marshall
McCurtain
Murray
Pittsburg
Pontotoc
Pushmataha
Seminole
Stephens

District No. 4
Caddo
Cleveland
Comanche
Grady
Greer
Harmon
Jackson
Kiowa
McClain
Oklahoma (Part)*
Pottawatomie
Tillman
Washita

*Part of Oklahoma County
Including:
Choctaw
Harrah
Luther
Midwest City
Newalla
Nicoma Park
Spencer
South of 89th Street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2019 OK CIV APP 23

IN RE MARRIAGE OF DALTON: ASHLEY HUGHES DALTON, Petitioner/Appellant, vs. BRYAN LEE DALTON, Respondent/ Appellee.

Case No. 116,056. February 15, 2019

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

HONORABLE OWEN T. EVANS, JUDGE

REVERSED AND REMANDED

Brad K. Cunningham, Conner & Winters, L.L.P., Tulsa, Oklahoma, for Appellant,

Mark Antinoro, Antinoro Law Firm, P.L.C., Pryor, Oklahoma, for Appellee.

Larry Joplin, Presiding Judge:

¶1 Petitioner/Appellant Ashley Hughes Dalton (Wife) seeks review of the trial court's order directing payment of support alimony in installments by Respondent/Appellee Bryan Lee Dalton (Husband) pursuant to the parties' consent divorce decree. In this appeal, Wife complains the trial court impermissibly modified accrued payments of support alimony and, in so doing, violated her right to remarry by extending Husband's spousal support obligation an additional six and one-half years.

¶2 The parties married in 1996. Wife filed a Petition for Dissolution of Marriage in March 2011. The parties settled all issues and divorced by consent decree May 22, 2012. According to the consent decree, Husband agreed to pay Wife support alimony in the total sum of $225,000.00. The consent decree provided for Husband's payment of support alimony to Wife in installments according to the following schedule: $4,500.00 per month for twelve months, then $4,250.00 per month for the next twelve months, then $4,000.00 per month for twenty-four months. Apparently, however, neither Husband nor Wife noticed that the installment schedule provided for the payment of only $201,000.00 total, not the $225,000.00 to which the parties agreed.

¶3 On August 14, 2015, Husband filed a motion to terminate his support alimony obligation, there remaining some eight months of installment payments due. Husband alleged a change of circumstances in his ability to pay support, and Husband ceased making installment payments pursuant to the consent decree. In January 2016, Wife cited Husband for contempt on account of his failure to pay the installments of support according to the consent decree. After a pre-trial conference in August 2016, the trial court scheduled trial for January 25, 2017.

¶4 Prior to trial, in September 2016, Wife filed a motion for summary judgment, arguing that all payments of support due under the consent decree had accrued and were not subject to termination or modification. Husband responded, and argued his support obligation was subject to termination on the alleged change of conditions. In October 2016, the trial court denied Wife's motion for summary judgment.

¶5 Wife filed a second motion for summary judgment on December 8, 2016, again arguing the trial court could not terminate or modify the accrued and unpaid support alimony due under the parties' consent decree. Prior to trial on the date of hearing on the merits, the trial court denied Wife's second motion for summary judgment.

¶6 At trial, the evidence demonstrated that, at all times after he stopped paying, Husband possessed sufficient funds to make his required payments of support according to the consent decree. At the time of trial, Husband owed some $30,000.00 in past due installments of support alimony, and the $24,000.00 difference between the agreed-to support alimony of $225,000.00 and the $201,000.00 total of installments.

¶7 Noting the disparity between Husband's agreement to pay $225,000.00 in support alimony, and the installment schedule providing for Husband's payment of only $201,000.00, the trial court directed Husband to pay the total of $54,000.00 in support alimony due under the consent decree ($30,000.00 in past due installments and the $24,000.00 difference between the total support obligation of $225,000.00 and the total scheduled installments), in installments according to a schedule

beginning in April 2017, and extending over the next 78 months.

¶8 Wife appeals. Wife again asserts the trial court lacked the power to modify or terminate payments of Husband's support obligation which had already accrued at the time of trial.

¶9 On this issue, and both at the time of filing of Husband's motion to terminate and at the time of trial, §134(D) of title 43, O.S., provided:

> [T]he provisions of any dissolution of marriage decree pertaining to the payment of alimony as support may be modified upon proof of changed circumstances relating to the need for support or ability to support which are substantial and continuing so as to make the terms of the decree unreasonable to either party. Modification by the court of any dissolution of marriage decree pertaining to the payment of alimony as support, pursuant to the provisions of this subsection, may extend to the terms of the payments and to the total amount awarded; provided however, such modification shall only have prospective application.

43 O.S. Supp. 2012 §134(D). (Emphasis added.) In *McCoy v. McCoy*, 1995 OK CIV APP 38, 892 P.2d 680, the Court of Appeals construed the phrase, "prospective application," as used in this version of §134(D), as evincing our legislature's intent to limit the authority of an Oklahoma trial court to modify only payments of support alimony which came due after the date of the court's order for modification. *McCoy*, 1995 OK CIV APP 38, ¶¶6-9, 892 P.2d at 681-682.

¶10 We believe the Court of Appeals properly interpreted the "prospective application" language of §134(D) as limiting the trial court's authority to modify only payments of support alimony which come due after the date of the order for modification. At the time of trial in the present case, there remained an accrued arrearage of $30,000.00 due and unpaid for support alimony under the consent decree's schedule of payments. The trial court lacked the authority to modify the terms for payment of those installments which had already accrued at the time of trial.

¶11 We are likewise convinced that, notwithstanding the computational error for payment of Husband's support alimony obligation in installments, the consent decree's silence concerning the obligation to pay the $24,000.00 difference between the total support obligation of $225,000.00 and the $201,000.00 total of installments can only be construed to require the payment of the final $24,000.00 in support alimony as due upon completion of the schedule for payment of the expressly provided-for installments. To hold otherwise would impose on the parties a term for the payment of the total support obligation in installments, a matter to which they did not expressly agree. We consequently hold the trial court lacked the authority to direct the payment of the final $24,000.00 in support alimony otherwise than in lump sum.

¶12 The order of the trial court providing for Husband's payment of support alimony in installments otherwise than agreed and contrary to the limits of §134(D) allowing only prospective modification of unaccrued support alimony is consequently REVERSED and the cause REMANDED for entry of an order consistent with this opinion.

GOREE, C.J., and BUETTNER, J., concur.

Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS
Thursday, April 18, 2019

F-2017-1167 — Revival Aso Pogi, Appellant, was tried by jury for the crime of First Degree Murder in Case No. CF-2014-2570 in the District Court of Oklahoma County. The jury returned a verdict of guilty and recommended as punishment life imprisonment. The trial court sentenced accordingly. From this judgment and sentence Revival Aso Pogi has perfected his appeal. AFFIRMED. Opinion by: Kuehn, V.P.J.; Lewis, P.J., concur; Lumpkin, J., concur in result; Hudson, J., concur; Rowland, J., recuse.

F-2017-1042 — Appellant Vincent Ray Perosi was tried by jury and convicted of First Degree Murder (Counts I and II) and Assault and Battery with a Deadly Weapon, Case No. CF-2016-16 in the District Court of Garfield County. The jury recommended as punishment life imprisonment without the possibility of parole in Counts I and II and life imprisonment in Count III. The trial court sentenced accordingly, ordering the sentences to run consecutively. It is from this judgment and sentence that Appellant appeals. The Judgment and Sentence is AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concur; Hudson, J., Concur; Rowland, J., Concur.

RE-2018-128 — On June 5, 2014, Appellant Milton Roger Hornsby, entered a plea of no contest in McIntosh County District Court Case Nos. CF-2012-45 and CF-2012-60. Appellant was convicted and sentenced to twenty years imprisonment, with all twenty years suspended, for Count 1 and six months imprisonment, with all six months suspended, each for Counts 2-6 in Case No. CF-2012-45 and to twenty years imprisonment, with all twenty years suspended, in Case No. CF-2012-60. On September 19, 2016, the State filed a Motion to Revoke Suspended Sentence, in both cases. Following a December 29, 2016, hearing on the applications, Judge Bland revoked ten years of Appellant's remaining suspended sentence. The revocation is AFFIRMED. Opinion by: Rowland, J.: Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs in results; Hudson, J., concurs.

C-2018-410 — Petitioner Sean Alan Reynolds entered a negotiated plea of guilty in the District Court of LeFlore County, Case No. CF-2016-365, to Soliciting Sexual Conduct or Communication with a Minor by Use of Technology (Count 1) and Possession of Juvenile Pornography (Count 3). On March 7, 2018, the Honorable Marion D. Fry, Associate District Judge, accepted Reynolds' guilty pleas and sentenced him to ten years imprisonment on Count 1 and to fifteen years imprisonment with all but the first ten years suspended on Count 3. The sentences were ordered to be served concurrently. Reynolds filed a timely motion to withdraw his plea. After a hearing, the motion to withdraw was denied. Reynolds appeals the denial of his motion to withdraw plea. Petition for a Writ of Certiorari is DENIED. The district court's denial of Petitioner's motion to withdraw plea is AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs in results; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs.

C-2018-315 — Petitioner, David Duane Albright, was charged by Information in District Court of Delaware County Case No. CF-2010-369A with Manufacture of Controlled Dangerous Substance (Methamphetamine) (Count 1), Possession of Controlled Substance (Methamphetamine) (Count 2), and Maintaining a Place for Keeping/Selling Controlled Substance (Methamphetamine) (Count 3) After Two or More Felony Convictions. Petitioner and the State entered into a negotiated drug court plea and on December 29, 2010, Petitioner entered a plea of guilty to these charges with the assistance and advice of counsel. The Honorable Robert G. Haney, District Judge, accepted Petitioner's plea but deferred sentencing pending completion of the Delaware County Drug Court Program. On March 5, 2013, the Honorable Alicia Littlefield, Special Judge, terminated Petitioner's participation in the Drug Court program. On September 6, 2013, Judge Littlefield sentenced Petitioner in accordance with the plea agreement sentencing Petitioner to imprisonment for life and a $50,000.00 fine in Count 1; twenty (20) years and a $1,000.00 fine in Count 2; and life and a $1,000.00 fine in Count 3. Judge Littlefield

ordered the sentences to run consecutively. On September 16, 2013, Petitioner filed his Motion to Withdraw Guilty Pleas. The District Court appointed conflict counsel to represent Appellant and held an evidentiary hearing on Petitioner's motion on September 23, 2013. The District Court denied the motion. Initially, Petitioner failed to perfect an appeal. However, this Court granted him an appeal out of time on March 21, 2018 and Petitioner has now timely commenced the present appeal. The District Court's order denying Petitioner's Motion to Withdraw Plea is AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concur; Hudson, J., Concur; Rowland, J., Specially Concur.

F-2017-1231 — Antonio Tiwan Taylor, Appellant, was tried by jury for the crime of two counts of Sexual Abuse of a Child, After Conviction of Four Felonies in Case No. CF-2015-4412 in the District Court of Oklahoma County. The jury returned a verdict of guilty and recommended as punishment life imprisonment on both counts. The trial court sentenced accordingly and ordered the terms to be served consecutively. From this judgment and sentence Antonio Tiwan Taylor has perfected his appeal. AFFIRMED. Opinion by: Kuehn, V.P.J.; Lewis, P.J., concur; Lumpkin, J., specially concur; Hudson, J., concur in result; Rowland, J., recuse.

F-2017-1270 — Bryan James Abner, Appellant, appeals from an order of the District Court of Cleveland County, entered by the Honorable Leah Edwards, District Judge, terminating Appellant from Drug Court participation and sentencing him in accordance with the plea agreement and Drug Court Contract in Case Nos. DC-2015-33, CF-2012-1475, CF-2012-2011, CF-2014-44, CF-2014-495, CF-2014-1461 and CF-2016-236. AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concur; Hudson, J., Concur; Rowland, J., Concur.

F-2018-184 — Juanita Martinez Gomez, Appellant, was tried by jury for the crime of First Degree Malice Murder, After Conviction of a Felony in Case No. CF-2016-7250 in the District Court of Oklahoma County. The jury returned a verdict of guilty and recommended as punishment life imprisonment without possibility of parole. The trial court sentenced accordingly. From this judgment and sentence Juanita Martinez Gomez has perfected her appeal. AFFIRMED. Opinion by: Kuehn, V.P.J.; Lewis, P.J., concur; Lumpkin, J., concur in result; Hudson, J., concur; Rowland, J., recuse.

RE-2017-801 — Donald Antwan Mayberry, Appellant, appeals from the revocation in full of his concurrent ten year suspended sentences in Case No. CF-2015-6624 in the District Court of Oklahoma County, by the Honorable Timothy R. Henderson, District Judge. AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concurs; Kuehn, V.P.J., Concurs; Lumpkin, J., Concurs; Rowland, J., Concurs.

COURT OF CIVIL APPEALS
(Division No. 1)
Thursday, April 18, 2019

116,105 — Wanda L. McGlothlin, Plaintiff/Appellee, v.James A. Fuller, Defendant/Appellant. Appeal from the District Court of Choctaw County, Oklahoma. Honorable Bill Baze, Judge. Opinion by: Larry Joplin, Presiding Judge. Defendant seeks review of the trial court's order quieting title to real property in Plaintiff. In this appeal, Defendant asserts he presented sufficient evidence to demonstrate Plaintiff's conveyance to him of real property for valuable consideration pursuant to a joint venture agreement, or alternatively, an award of damages for labor and improvements he performed on the property, and error of the trial court in holding otherwise. In the present case, the parties agreed the deeds from Plaintiff to Defendant were not to be filed and were not effective until Plaintiff's death. The trial court held the deeds conveyed no present interest in the property to Defendant. The trial court's conclusion is not against the clear weight of the evidence. The trial court specifically found the testimony of Defendant not credible and insufficient to support his claims, particularly concerning the filing of the deeds, the deposits into Plaintiff's account, and his other alleged contributions to the maintenance and improvement of the property. We will not second guess the trial court's judgment concerning the credibility of witnesses here on appeal. AFFIRMED. Opinion by Joplin, P.J.; Goree, C.J., and Buettner, J., concur.

116,392 — Veros Credit, L.L.C., Plaintiff/Appellant, v. Jorge Serrano d/b/a J & E Auto Repair, Defendant/Appellee, State ex rel. Oklahoma Tax Commission, Defendant. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Aletia Haynes Timmons, Judge. Plaintiff/Appellant Veros Credit, L.L.C. seeks review of the trial court's order vacating Plaintiff's judgment against Defen-

dant/Appellee Jorge Serrano d/b/a J & E Auto Repair. We reverse the order because a defendant's unintentional failure to respond to a motion for summary judgment does not constitute "mistake, neglect, or omission of the clerk or irregularity in obtaining a judgment or order" as provided by 12 O.S. §1031(3). Section 1031(3) addresses errors of the court clerk and jurisdictional irregularities, not a party's accidental failure to file a response to a motion for summary judgment. *Washington v. Tulsa County*, 2006 OK 92, ¶ 13, 151 P.3d 121, 124, citing *Board of Trustees of Town of Davenport v. Wilson*, 1998 OK CIV APP 4, ¶ 3, 953 P.2d 764, 765. Opinion by Goree, C.J.; Buettner, J., concurs and Joplin, P.J., dissents.

(Division No. 3)
Friday, April 19, 2019

116,036 — James R. Newlon a/k/a James R. Newton, and Nanci A. Bradford, Plaintiffs/Appellees, vs. Renee Marie Martin-Lopez, Defendant/Appellant, Renee Marie Martin-Lopez, Third-Party Plaintiff, vs. Centurian, Inc. d/b/a C21/Goodyear-Green; Roy Snell; Shelter Home Inspection Service, LLC, and American Eagle Title Group, LLC, Third-Party Defendants/Appellees. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Bryan C. Dixon, Trial Judge. Defendant/Third-Party Plaintiff/Appellant Renee Marie Martin-Lopez (Appellant) appeals from orders granting summary judgment in favor of Plaintiffs/Third-Party Defendants/Appellees James R. Newlon and Nanci A. Bradford (Plaintiffs), Third-Party Defendants/Appellees Centurian, Inc. d/b/a Goodyear-Green, Roy Snell, and American Eagle Title Group, L.L.C. in a foreclosure action brought by Plaintiffs. The trial court found there was no dispute that Appellant executed the note and mortgage, and that Appellant defaulted on the payments. The trial court also determined that Appellant's counterclaims and third-party claims were barred under the Residential Property Condition Disclosure Act (RDA). Appellant argues that whether she personally signed the note and mortgage, whether Newlon and Bradford contributed to or caused the default, and whether American Eagle breached its fiduciary duty were questions of fact precluding summary judgment; and that the trial court erred in denying claims under the RDA. Because Appellant has failed to provide the appropriate record on appeal, we cannot review the trial court's order granting summary judgment in favor of the Plaintiffs. We also find unpersuasive Appellant's contentions of error with regard to the trial court's award of judgment in favor of the third-party defendants. Therefore, the orders of the trial court are AFFIRMED. Opinion by Swinton, J.; Mitchell, P.J., and Bell, J., concur.

116,317 — State of Oklahoma, Plaintiff/Appellee, vs. 2007 Dodge Charger 4-Door Car (Black), OK Tag: 519MSV, VIN: 2BLA43H17H8 17892, Defendant, and Mark Hennesy, Lorrie Hennesy, and Anthony Hennesy, Claimants/Appellants. Appeal from the District Court of Washington County, Oklahoma. Honorable Curtis L. DeLapp, Judge. Claimants/Appellants, Mark Hennesy and Lorrie Hennesy (Parents) and Anthony Hennesy (Anthony), appeal from the trial court's judgment ordering the forfeiture of an automobile owned by Anthony and titled solely in his name. Parents loaned Anthony money for the purchase and repainting of the subject car. They memorialized the loan in a document the parties refer to as the Promissory Note. Following Anthony's arrest for drug crimes, State seized the car and then sought its forfeiture. Relying on the Promissory Note, Parents moved to dismiss the forfeiture action on the ground they possessed a lien against the car prior to the date it was seized. All three Appellants also asserted the forfeiture action was untimely filed and the delay violated their due process rights. The trial court rejected those claims and ordered the vehicle forfeited. We hold the Promissory Note evinced a debt, but did not constitute a security interest in the car. It neither described the purported secured collateral nor did it contain any indication that it was intended by the parties to create a security interest in the subject vehicle. Thus, Parents lack standing to object to the forfeiture. We also find State's initial forfeiture petition was timely filed within one year of the seizure pursuant to 63 O.S. 2011 §2-506 and 12 O.S. 2011 §95(A)(4), and was timely refiled pursuant to 12 O.S. 2011 §100 two days after the first petition was dismissed "otherwise than upon the merits." Further, the filing of State's petitions, and the time delay between the seizure and the final judgment did not violate Anthony's due process rights. Finally, because Anthony has failed to demonstrate the district attorney acted contrary to law, his request for an attorney fee award is denied. AFFIRMED. Opinion by Bell, J.; Mitchell, P.J., and Swinton, J., concur.

116,319 — Jennifer Thompson, Petitioner/Appellee, vs. Rick Thompson, Respondent/Appellant. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Tammy Bruce, Judge. In this post dissolution of marriage proceeding, Respondent/Appellant, Rick Thompson, appeals from the trial court's judgment finding him guilty of contempt of court for failing to pay Petitioner/Appellee, Jennifer Thompson, $13,607.86 for past due child support and day care and medical expenses. After reviewing the record, and the appellate court's opinion in *In re Marriage of Thompson*, Case No. 113,828 (July 8, 2016)(unpublished), we affirm the trial court's judgment. AFFIRMED. Opinion by Bell, J.; Mitchell, P.J., and Swinton, J., concur.

116,838 — Mary Sue Starcevich, Petitioner/Appellant, vs. John P. Starcevich, Respondent/Appellee. Appeal from the District Court of Cleveland County, Oklahoma. Honorable Lori Walkley, Judge. In this post-dissolution of marriage proceeding, Petitioner/Appellant, Mary Sue Starcevich (Wife), appeals from the trial court's order denying her motion to clarify the trial court's order of September 30, 2015 (Settlement Order), combined with her motion to compel division (delivery) of marital property from Respondent/Appellee, John P. Starcevich (Husband). After reviewing the record, we find Wife did not relinquish the marital property she was awarded in the decree when she entered into the Settlement Order. Instead, the Settlement Order was limited to the "remaining" post-remand issues, *i.e.* Wife's marital interest in the enhanced value of Husband's dental practice, the marital value of the farm and equipment, and Wife's share of the Morgan Stanley balancing account. Because Husband maintains Wife relinquished any further claims to these marital assets and, specifically, the Knights of Columbus annuity cash value, we hold the Settlement Order requires clarification. We also find the trial court abused its discretion when it denied Wife's motion to compel the division (and delivery) of the marital property awarded to Wife by the trial court's decree of dissolution of marriage. The trial court's order denying Wife's motion to clarify and compel division of marital property is REVERSED AND REMANDED TO THE TRIAL COURT WITH INSTRUCTIONS to hold an evidentiary hearing to ascertain and insure the parties take the necessary actions and sign the appropriate documents to effectuate the division and delivery of marital property in accordance with this opinion. Opinion by Bell, J.; Mitchell, P.J., and Swinton, J., concur.

117,074 — Jasen R. Elias, Plaintiff/Appellant, vs. Griffin Communications, LLC, an Oklahoma Limited Liability Company; Frontier Media Group, Inc., an Oklahoma not-for-profit corporation; Ziva Branstetter, an individual; and Dylan Goforth, an individual, Defendants/Appellees. Appeal from the District Court of Creek County, Oklahoma. Honorable Joe Sam Vassar, Judge. In this action for defamation, intentional infliction of emotional distress and false light invasion of privacy, Plaintiff/Appellant, Jasen R. Elias, appeals from the trial court's dismissal of his petition pursuant to the Oklahoma Citizen Participation Act, 12 O.S. Supp. 2014 §1430 *et seq*. (OCPA). Elias' petition alleged Defendants/Appellees defamed him in a series of articles and social media posts published about him. The stories generally concerned Plaintiff's arrest on December 31, 2016, his booking and release on bond. Defendants filed separate motions to dismiss, which were granted by the trial court. The trial court held either Plaintiff failed to present clear and specific evidence to establish a *prima facie* case or Plaintiff's allegations were negated as a matter of law by Defendants' defenses. Upon *de novo* review, we conclude the trial court correctly applied the OCPA in dismissing Plaintiff's petition. Specifically, we hold the trial court's findings of fact are supported by sufficient competent evidence, and that the trial court's findings of fact and conclusions of law adequately explain the decision. AFFIRMED UNDER RULE 1.202 (b) & (d). Opinion by Bell, J.; Mitchell, P.J., and Swinton, J., concur.

(Division No. 4)
Monday, April 15, 2019

116,217 — (Companion to Case No. 115,967) — Andrew Hale and Keri Hale, Individually and as Parents and Next Friends of Henry Hale, a minor child, Plaintiffs/Appellants v. HCA Health Services of Oklahoma, Inc., d/b/a OU Medical Center; HCA, Inc.; Katherine Smith, M.D., Individually; Elisa Crouse, M.D., Individually; Landon Lorentz, M.D., Individually, Dawn Karlin, C.N.M., Individually, Defendants, and OU Physicians, d/b/a OU Physicians for Women's Health, Defendant/Appellee. Appeal from an Order of the District Court of Oklahoma County, Hon. Bryan C. Dixon, Trial Judge, granting summary judgment to Defendant OU Physicians d/b/a OU Physicians for Women's Health (OUP). The trial court dismissed Plaintiffs' suit

against OUP, finding OUP was subject to the provisions of the Oklahoma Governmental Tort Claims Act, 51 O.S.2011, §§ 151 through 172 (OGTCA), but was not served in accordance therewith; therefore, it should be dismissed from the suit for lack of jurisdiction. Reviewing the applicable law, the evidentiary material contained in both parties' summary judgment briefs and the transcript of the summary judgment motion, we agree with the trial court that summary judgment is appropriate. The trial court found that "OU Physicians" is organized, managed and supervised by the Board of Regents for the University of Oklahoma, and is not an independent, unincorporated association. As such, the entity known in this matter as OU Physicians is subject to the provisions of the OGTCA. For these reasons and those set out in *Hale I*, we affirm the trial court's order. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Goodman, J.; Fischer, P.J., and Thornbrugh, J., concur.

116,497 (Companion to Case No. 116,217) — Christian Zeaman, as Legal Guardian of Isabel Ibarra-Soto, a minor child, Plaintiff/Appellant v. OU Physicians, Defendant/Appellee, and HCA Health Services of Oklahoma, Inc., d/b/a OU Medical Center; HCA Holdings, Inc.; Heather Jones, M.D.; Whitney Driver, M.D.; Angela Hawkins, M.D., and Andrea Palmer, M.D., Defendants. Appeal from an Order of the District Court of Oklahoma County, Hon. Lisa Davis, Trial Judge. Plaintiff Christian Zeaman, as Legal Guardian of Isabel Ibarra-Soto, a minor child, appeals the trial court's order dismissing her claim. Appellant "OU Physicians" or more accurately, State of Oklahoma, ex. rel. Board of Regents of the University of Oklahoma, filed a motion to dismiss claiming a trial court ruling in Appeal No. 116,217, *Hale v. HCA Health Services of Oklahoma Inc., et al.*, required dismissal. This appeal is made a companion to Appeal No 116,217. This Court held in *Hale* that the defendant in that case, denominated by Plaintiffs as "OU Physicians", is not an independent entity, but is part of the University of Oklahoma Health Sciences Center, which, as a political subdivision, is in turn subject to the provisions of the Oklahoma Governmental Tort Claims Act, 51 O.S.2011, §§ 151 through 172. The identical issue is presented to us in this appeal. Based on our review of the facts and applicable law, and pursuant to our decision in Appeal No. 116,217, we affirm the order under review. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Goodman, J.; Fischer, P.J., and Thornbrugh, J., concur.

Tuesday, April 16, 2019

117,471 — Milliger Construction Co., Plaintiff/Appellant, v. Tracy Downs and Darrell Downs, Defendants/Appellees. Appeal from an Order of the District Court of Tulsa County, Hon. Linda Morrissey, Trial Judge. This case involves a claim by Milliger Construction that Downs breached the parties' contract by complaints allegedly made after completion of the contract and performance by both parties. Milliger Construction claims that Downs violated a duty of good faith and that violation constituted the breach of contract. However, the acts alleged and the breach occurred after the parties performed their contract. There is no contractual provision shown that Downs breached. The entire basis for the breach of contract claim relies upon post-performance complaints allegedly made by Downs. The only known duty on the part of Downs was to pay the agreed contract price, when due. They did so. Subsequent complaints, if any, have no relationship to the duty to pay the contract price and, standing alone, these complaints do not constitute a breach of contract. The defamation claim allegations in the Amended Petition are adequate to withstand a Section 2012(B)(6) motion to dismiss. The decision dismissing the defamation claim is reversed. AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Wiseman, V.C.J., and Goodman, J. (sitting by designation), concur.

ORDERS DENYING REHEARING
(Division No. 1)
Friday, April 5, 2019

116,521 — Wells Fargo, National Association, as Trustee for Certificate Holders of Bear Stearns Asset-Backed Securities I L.L.C., Asset-Backed Certificates, Series 2007-AC3 a/k/a Wells Fargo Bank, National Association, as Trustee for Bear Stearns Asset-Backed Securities I Trust 2007-AC3, Asset-Backed Certificates, Series 2007-AC3, Plaintiff/Appellee, vs. Cherie Bass, a/k/a Cherie D. Bass, Defendant/Appellant, and John Doe, Spouse of Cherie Bass a/k/a Cherie D. Bass, if married, Occupants of the Premises; First Pryority Bank; The Vintage at Verdigris Homeowners Assocation; Portfolio Recovery Assocation; Portfolio Recovery Associates, L.L.C., Defendants. Appellant's Petition for Rehearing, filed March 21st, 2019, is *DENIED*.

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NORMAN BASED FIRM IS SEEKING A SHARP & MOTIVATED ATTORNEY to handle HR-related matters. Attorney will be tasked with handling all aspects of HR-related items. Experience in HR is required. Firm offers health/dental insurance, paid personal/vacation days, 401k matching program and a flexible work schedule. Members of our firm enjoy an energetic and team-oriented environment. Position location can be for any of our Norman, OKC or Tulsa offices. Submit resumes to justin@polstontax.com.

WATKINS TAX RESOLUTION AND ACCOUNTING FIRM is hiring attorneys for its Oklahoma City and Tulsa offices. The firm is a growing, fast-paced setting with a focus on client service in federal and state tax help (e.g. offers in compromise, penalty abatement, innocent spouse relief). Previous tax experience is not required, but previous work in customer service is preferred. Competitive salary, health insurance and 401K available. Please send a one-page resume with one-page cover letter to Info@TaxHelpOK.com.

MAKE A DIFFERENCE AS THE ATTORNEY FOR A MEDICAL/LEGAL PARTNERSHIP. Are you fervent about equal justice? Legal Aid Services of Oklahoma (LASO) is a nonprofit law firm dedicated to the civil legal needs of low-income persons. If you are passionate about advocating for the rights of underserved, LASO is the place for you, offering opportunities to make a difference and to be part of a dedicated team. LASO has 20 law offices across Oklahoma, and LASO has an opening for a passionate attorney in our Lawton office to assist with a medical/legal partnership between LASO and Comanche County Memorial Hospital (Lawton). The successful candidate will function in all areas of the law impacting medical conditions, from housing to family, etc. This is a unique opportunity to make a real difference in the lives of clients. LASO offers a competitive salary and a very generous benefits package, including health, dental, life, pension, liberal paid time off and loan repayment assistance. Additionally, LASO offers a great work environment and educational/career opportunities. The online application can be found at https://legalaidokemployment.wufoo.com/forms/z7x4z5/. Website www.legalaidok.org. Legal Aid is an Equal Opportunity/Affirmative Action Employer.

HARRISON & MECKLENBURG INC., A WELL-ESTABLISHED AV-RATED FIRM with offices in Kingfisher, Stillwater and Watonga, is looking for an associate with a strong academic background and preferably 2-5 years' transactional, tax, estate planning, real estate and/or general business law experience. Please visit hmlaw office.com for additional information about the firm. For more information or to submit a resume and law school transcript, please email austin@hmlawoffice.com.

POSITIONS AVAILABLE

MAKE A DIFFERENCE AS THE ATTORNEY FOR DOMESTIC VIOLENCE SURVIVORS. Do you want to ensure that survivors of domestic violence obtain justice and an end to violence in their lives for themselves and their children? Are you fervent about equal justice? Legal Aid Services of Oklahoma (LASO) is a nonprofit law firm dedicated to the civil legal needs of low-income persons. If you are passionate about advocating for the rights of domestic violence survivors, LASO is the place for you, offering opportunities to make a difference and to be part of a dedicated team. LASO has 20 law offices across Oklahoma. The successful candidate should have experience in the practice of family law, with meaningful experience in all aspects of representing survivors of domestic violence. We are seeking a victim's attorney in Pawhuska. This is an embedded position, providing the attorney with access to clients in need. LASO offers a competitive salary and a very generous benefits package, including health, dental, life, pension, liberal paid time off and loan repayment assistance. Additionally, LASO offers a great work environment and educational/career opportunities. The online application can be found at https://legalaidokemployment.wufoo.com/forms/z7x4z5/. Website www.legalaidok.org. Legal Aid is an Equal Opportunity/Affirmative Action Employer.

ESTABLISHED SMALL INSURANCE DEFENSE AND COVERAGE FIRM SEEKS 4-8 YEAR ATTORNEY(S) with strong research and writing skills and deposition/courtroom experience to support growing practice. Extraordinary growth potential for person(s) with strong work ethic and attention to detail. Send resume to: rstewart@rstewartlaw.com.

THE OKLAHOMA OFFICE OF THE ATTORNEY GENERAL IS CURRENTLY SEEKING A FULL-TIME ASSISTANT ATTORNEY GENERAL for our Medicaid Fraud Control Unit with an emphasis on criminal prosecution. The Medicaid Fraud Control Unit investigates and prosecutes Medicaid fraud; as well as abuse, neglect, exploitation and drug diversion in long-term board and care facilities. The successful candidate will have outstanding legal judgment and be able to effectively and professionally research, prepare, analyze and understand complex information and legal issues. The successful candidate must maintain the integrity of the Attorney General's Office as well as the confidentiality of information as required by the Oklahoma attorney general. Extensive in-state travel, including some over-night travel, is required. Applicants must be a licensed attorney in the state of Oklahoma with at least 3 years of professional experience in the practice of law. Strong writing and oral advocacy skills are required. The Oklahoma Office of Attorney General is an equal employment employer. Please contact our office directly if you require a reasonable accommodation applying. Please send resume to resumes@oag.ok.gov and indicate which particular position you are applying for in the subject line of the email.

POSITIONS AVAILABLE

DISTRICT 17 DA'S OFFICE IS LOOKING FOR AN ASSISTANT DISTRICT ATTORNEY for our Choctaw County Office. Requires a Juris Doctorate from an accredited law school. Salary range $55,000 to $70,000. Must be admitted to the Oklahoma state bar and be in good standing. Submit a resume with supporting documentation to District Attorney Mark Matloff, 108 N Central, Suite 1, Idabel, OK 74745; Office: 580-286-7611, Fax: 580-286-7613; email: tammy.toten@dac.state.ok.us.

MAKE A DIFFERENCE AS A BILINGUAL ATTORNEY FOR THE LATINO COMMUNITY. Are you fervent about equal justice? Legal Aid Services of Oklahoma (LASO) is a nonprofit law firm dedicated to the civil legal needs of low-income persons. If you are passionate about advocating for the rights of the Latino community and domestic violence survivors, LASO is the place for you, offering opportunities to make a difference and to be part of a dedicated team. LASO has 20 law offices across Oklahoma, and LASO has an opening for a passionate bilingual attorney in its Oklahoma City law office. The attorney will be imbedded at the Latino Community Action Agency in Oklahoma City. Clients will be domestic violence survivors. LASO offers a competitive salary and a very generous benefits package, including health, dental, life, pension, liberal paid time off and loan repayment assistance. Additionally, LASO offers a great work environment and educational/career opportunities. The online application can be found at https://legalaidokemployment.wufoo.com/forms/z7x4z5/. Website www.legalaidok.org. Legal Aid is an Equal Opportunity/Affirmative Action Employer.

CURRENT EMPLOYMENT OPPORTUNITY AT CHEROKEE NATION. Position closing 5/19/2019. RFT health services general counsel, Office of Attorney General, Tahlequah, OK. If you are interested in working for the Cherokee Nation, visit our website at www.cherokee.org or you may contact us at Cherokee Nation Human Resources Department, P.O. Box 948, Tahlequah, OK 74465; 918-453-5292 or 918-453-5050. Cherokee Nation offers exceptional employee benefits, including comprehensive health and life insurance, 401(K), holiday pay, sick leave and annual leave.

LARGE AV-RATED TULSA LAW FIRM SEEKS AN ATTORNEY WITH 5-10 YEARS of employment law experience primarily representing employers. Compensation commensurate with experience. Excellent benefits, including an employer matching program. Our attorneys are aware of this ad. Please submit your cover letter and resume to Oklahoma Bar Association, "Box M," P.O. Box 53036, Oklahoma City, OK 73152.

THE LAW FIRM OF CHUBBUCK DUNCAN & ROBEY PC is seeking an experienced associate attorney with 1-3 years of experience. We are seeking a motivated attorney to augment its fast-growing trial practice. Excellent benefits. Salary commensurate with experience. Please send resume and writing sample to, Attn: Danita Jones, Chubbuck Duncan & Robey PC, located at 100 North Broadway Avenue, Suite 2300, Oklahoma City, OK 73102.

POSITIONS AVAILABLE

THE LAW OFFICES OF JEFF MARTIN IS SEEKING AN ASSOCIATE WITH 0-5 YEARS OF EXPERIENCE. We handle all injury cases, motor vehicle accidents, slip and falls, social security disability and veterans' benefits. Competitive salary with health, dental, vision, life insurance and 401k benefits. Paid vacation. Customer service, sales, insurance or medical background is a plus. This is NOT a research/writing position. You will be regularly interacting with clients. We are a team-oriented firm committed to positive outcomes for our clients. Send resumes to hansen@jeffmartinlaw.com. All resumes are strictly confidential.

MAKE A DIFFERENCE! Legal Aid Services of Oklahoma (LASO) is a nonprofit law firm dedicated to the civil legal needs of low-income persons. Funded in part by the federal Legal Services Corporation, LASO serves all of Oklahoma's 77 counties and has 20 offices statewide. LASO is hiring staff attorneys for its Guymon office. This position presents an opportunity to fill the dire need for high-quality representation of low-income persons in rural areas. The Guymon office, located on the Great Plains, serves the elderly and impoverished of the Oklahoma panhandle, including a sizeable immigrant worker population drawn by the meatpacking industry. Over 20 languages and dialects are represented in the English Language Learner program in the public school system. Guymon is centrally located for road trips to the American West – Denver is a six-hour drive, and Santa Fe is a five-hour drive. Historic Route 66 features prominently in the region, with Oklahoma City located four hours away and Amarillo, Texas, located two hours away. Applicants should be licensed Oklahoma attorneys, or out-of-state attorneys or law graduates eligible to sit for the next Oklahoma bar exam. Salaries are competitive for the civil legal aid sector. LASO offers a generous fringe benefit package, including health, dental, pension, loan repayment assistance and more. Complete an application online at https://legalaidokemployment.wufoo.com/forms/z7x4z5/. The position is open until filled, and interviews will be conducted on a rolling basis.

LOAN REPAYMENT ASSISTANCE

THE OKLAHOMA DISTRICT ATTORNEYS COUNCIL (DAC) IS PLEASED TO ANNOUNCE that DAC has been designated by the U.S. Department of Justice to award and disburse loan repayment assistance through the John R. Justice (JRJ) Loan Repayment Program. The State of Oklahoma has received a total of $34,576 to be divided among eligible full-time public defenders and prosecutors who have outstanding qualifying federal student loans. Applications are available online. For more information about the JRJ Student Loan Repayment Program and how to apply, please go to http://www.ok.gov/dac. Under "About the DAC", click on the "John R. Justice Student Loan Repayment Program" link. Application packets must be submitted to the DAC or postmarked no later than June 19, 2019.

CLASSIFIED INFORMATION

REGULAR CLASSIFIED ADS: $1.50 per word with $35 minimum per insertion. Additional $15 for blind box. Blind box word count must include "Box ___," Oklahoma Bar Association, PO Box 53036, Oklahoma City, OK 73152."

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ADVANCED DUI: LESSONS FROM THE NATIONAL MASTERS

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PROGRAM PLANNER/MODERATOR:

Brian K. Morton, *OBA Board of Governors, Oklahoma City*

TOPICS COVERED:

- **Drug Recognition Evidence: What the Science & Studies Really Support**
  Doug Murphy, Houston, TX
- **The ABC's of DUI: SCRAM, IID, UA and EtG**
  William Kirk, Kirkland, WA
  National College of DUI Defense
- **Ethics: It's All About Vices and Virtues**
  Virginia Landry, Laguna Hills, CA
  National College of DUI Defense
- **Tear the Whole Place Down: Attacking Blood Test Results by Attacking Laboratory Accreditation**
  Joe St. Louis, Tuscon, AZ
  National College of DUI Defense
- **What if Alcoholism is Not a Disease? Other Ways of Dealing with Addicted Clients**
  William Kirk, Kirkland, WA
  National College of DUI Defense
- **Are Radical New DUI Laws Coming?**
  Bruce Edge, Tulsa
  John Hunsucker, Oklahoma City
  Brian Morton, Oklahoma City

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MCLE CREDIT 6/0

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FEATURED PRESENTER:
Michael Johnson, CEO, Clear Law Institute

When investigating a "he said/she said" case of sexual harassment or other alleged misconduct, are you and your clients using scientifically-validated methods to interview witnesses, assess their credibility, and reach a defensible conclusion?

In this seminar from former U.S. Department of Justice attorney Michael Johnson, you will learn about the hundreds of research studies that scientists have conducted on how to best interview witnesses and assess credibility.

By examining videos and case studies, you will learn:

- **How to utilize the "cognitive interview," which is the most widely researched interviewing technique in the world**
- **How many common beliefs about spotting deception are incorrect**
- **How to apply research-based methods for detecting signs of deception and truthfulness**
- **The legal requirements for workplace investigations**
- **A 6-step process for writing clear and concise investigative reports**